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THE IMPORTANCE OF THE POLITICAL IN IMMIGRATION FEDERALISM

S. Karthick Ramakrishnan^{*}
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ABSTRACT

This Article provides a systematic, empirical investigation of the genesis of state and local immigration regulations, discrediting the popular notion that they are caused by uneven demographic pressures across the country. It also proffers a novel theory to explain the proliferation of these policies and queries the implications of this new model for federalism analysis. The story we tell in this paper is both political and legal; understanding immigration politics uncovers vital truths about the recent rise of subnational involvement in a policy arena that courts and commentators have traditionally ascribed to the federal government. Thus, this article connects the proliferation of state and local regulation with the extra-constitutional political institutions and key policy actors who prominently influence both federal and subfederal immigration lawmaking but who remain obscured in traditional, apolitical accounts. This recognition of the political dynamics of immigration law, we argue, fundamentally alters judicial, scholarly, and public evaluations of immigration federalism.

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The title echoes Cristina Rodriguez's seminal piece, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008), which we invoke and contrast with our own theoretical approach and empirical findings.

INTRODUCTION

According to elected officials and policy advocates, the United States is undergoing a period of unprecedented demographic change, with unauthorized immigrants flooding in and causing cultural and economic upheaval in states and localities unaccustomed to such transformations or overly burdened by an accelerated rate of change.¹ For example, Lou Bartletta, mayor of a small city in central Pennsylvania that was among the earliest to pass a restrictive ordinance, testified to Congress that “[i]n Hazleton, illegal immigration is not some abstract debate about walls and amnesty, but it is a tangible, very real problem.”² State and local immigration laws emerge as compelled solutions to these newfound and intractable policy challenges.³ Indicative of this trend are the much-publicized enactments over the past five years in localities such as Hazleton, Pennsylvania; Spring Valley, Missouri; Farmer’s Branch, Texas; Escondido, California; and in states such as Arizona, Alabama, Georgia, and Mississippi.⁴ These jurisdictions are ostensibly responding to policy

1. In this paper, we will mostly refer to the class of persons of unauthorized immigrants, except when referring to the statements or actions of restrictionist actors who use the terms “illegal aliens” or “illegal immigrants.” Any reference to these persons is intended to mean a group that either entered without inspection or are otherwise out of status and unlawfully present in the United States.

2. See, e.g., *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the Subcomm. on the Judiciary*, 109th Cong. 11–13 (2006) (statement of Hon. Louis Barletta, Mayor, Hazleton, Pennsylvania).

3. See, e.g., Hazleton, Pa., Illegal Immigration Relief Act Ordinance, Ordinance 2006-18 (Sept. 12, 2006), available at http://www.aclu.org/files/pdfs/immigrants/hazleton_second_ordinance.pdf. The subsequent litigation challenging the ordinance, however, resulted in enjoinder of the law. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), vacated, 131 S. Ct. 2958 (2011). The U.S. Supreme Court forestalled a final decision on the case by remanding it to the federal appellate court for consideration in light of the Court’s recent decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). See *City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011). In *Whiting*, the Court upheld an Arizona law requiring businesses in the state to verify the legal status of their employees. *Whiting*, 131 S. Ct. at 1985–86.

4. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), enjoined in part by *Arizona v. United States*, 132 S. Ct. 2492 (2012); H.B. 87, 151st Gen. Assemb. (Ga. 2011); H.B. 488, 2012 Leg., Reg. Sess. (Miss. 2012); Escondido, Cal., Ordinance No. 2006-38 R (Oct. 18, 2006), available at http://www.aclu.org/files/pdfs/immigrants/escondido_ordinance.pdf, enjoined by *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006); Valley Park, Mo., An Ordinance Relating to Illegal Immigration Within the City of Valley Park, MO, Ordinance 1708 (July 17, 2006), available at http://www.aclu.org/files/pdfs/immigrants/valleypark_ordinance.pdf; Riverside, N.J., Illegal Immigration Relief Act, Ordinance 2006–16 (July 26, 2006); Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), available at <http://www.hazletoncity.org/090806/2006-18%20Illegal%20Alien%20Immigration%20Relief%20Act.pdf>; Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007), available at <https://www.farmersbranch.info/sites/default/files/Ordinance%20No%202903.pdf> (last

problems like economic stress, increased language isolation, wage depression, and overcrowding.⁵ These laws regulate immigrants in several ways. To wit, they create immigration enforcement schemes; define new state immigration crimes; promote English-only policies; and regulate housing, public services, and employment of unauthorized migrants.⁶

This demography-based explanation for state and local involvement is a familiar and intuitively appealing story relied upon by legal scholars, popular media, and elected officials alike. For example, Professor Cristina Rodriguez, in arguing for a functionalist understanding of local immigrant regulation, maintains that the demographic shifts caused by globalization and immigration “are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary”⁷ Thus, divergent needs in localities lead to contrasting approaches towards integrating and regulating the effects of immigrants on local economies.⁸ Professor Clare Huntington writes that “changing immigration patterns that have brought non-citizens to new parts of the country . . . and to suburban and rural areas. . . . [I]t is notable that the more punitive immigration measures often, although not always, are enacted in areas new to receiving significant populations of non-citizens.”⁹ Many media reports have also invoked this same wisdom of immigration-induced changes leading inexorably to policy pressures and legislative action at the local level.¹⁰

Importantly, elected officials and restriction advocates have paired these demographic claims with a complaint that the federal government has forsaken its constitutional and statutory responsibility to control unwanted immigration. In signing Arizona’s E-Verify law, then-Governor Janet

accessed Sept. 14, 2012) (held void and prohibited from being enforced in *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008)).

5. Lou Barletta, Mayor of Hazleton, Pa., Speech to the City Council of Hazleton, Pa. (July 13, 2006) (claiming that undocumented individuals were sapping the city of resources) (transcript available at <http://www.smalltowndefenders.com/node/7>).

6. See, e.g., Escondido, Cal., Ordinance No. 2006-38R (Oct. 18, 2006), available at http://www.aclu.org/files/pdfs/immigrants/escondido_ordinance.pdf (preventing landlords from renting or “harboring” illegal aliens in their property and imposing other related restrictions on rental and eviction proceedings).

7. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609 (2008).

8. *Id.* at 594 (“Communities are also jumping on the enforcement bandwagon because they seek control over their rapidly changing environments.”).

9. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 806 (2008).

10. See, e.g., Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007 (Magazine), <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html?pagewanted=all>.

Napolitano (now Secretary of the Department of Homeland Security) declared: “Immigration is a federal responsibility, but I signed [the law] because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs.”¹¹ Unable to wait any longer for the federal government to seal the border and vigorously enforce provisions of the Immigration and Nationality Act,¹² states and localities had to legislate to protect their residents and solve their impending demographic crisis.

Undoubtedly, this conventional wisdom is appealing. However, it is, at best, an incomplete account of the rise of subnational immigration regulation; at worst, it is purposefully misleading. In prior empirical work, we cast doubt on the factual premise undergirding much of the new immigration federalism, showing that state and local immigration laws are not, as commonly assumed, policy responses tailored to immigration-induced demographic problems.¹³ That is, the primary justifications undergirding most scholarly, political, and judicial explanations for this recent spate of state and local immigration regulations have little empirical support. Instead, restrictionist state and local laws are largely the product of political partisanship, with Republican-heavy areas especially ripe for political action.

Building on these original statistical findings, this paper advances a new, dynamic theory of legislative action and inaction in immigration law. The key theoretical deficiency with prior explanations is that they analyze subnational policy proliferation and federal legislative stagnation as independent, unconnected trends. Furthermore, both occur in an apolitical context. By contrast, our proposed model—which we have termed the “Polarized Change” model—explains developments at both levels, with extra-constitutional political institutions (political parties) and key policy actors (issue entrepreneurs) that catalyze immigration lawmaking. In the Polarized Change model, party polarization and ethnic nationalism after 9/11 present opportunities for more restrictive legislation on immigration,

11. Letter from Janet Napolitano, Governor of the State of Ariz., to Hon. Jim Weiers, Speaker of the House (July 2, 2007), *available at* <http://www.countysupervisors.org/uploads/07-07-02%20HB%202779%20Statement.pdf>.

12. Immigration and Nationality Act, 8 U.S.C. §§ 1101–05 (2012) (defining, *inter alia*, the class of persons who are unlawfully present and the process and standards for their discovery and removal).

13. See *infra* Appendix; see also S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* (Monica Varsanyi, ed. 2011).

and issue entrepreneurs press these advantages to push restrictionist legislation in jurisdictions with ripe political conditions.

Our proposed mechanism offers a unique take on both the directionality and intentionality of immigration policymaking. We argue that federal inactivity and subfederal activity are linked and interdependent. Issue entrepreneurs coordinate work across government levels, stalemating Congressional action at important moments, and subsequently use this “failure” to justify the proliferation of policies at the subfederal level. The reimaged causality of the Polarized Change model is especially significant because these state and local laws emerge within the constitutional context of presumed federal primacy in the field. Enacting restrictive policies in several jurisdictions normalizes the constitutional appropriateness of state and local participation in immigration regulation. Accordingly, our revised genesis story requires a change in commentators’ and courts’ evaluation of the federalism dynamics inherent in state and local immigration regulation.

This article proceeds in three parts. Part I briefly presents the empirical foundation of subfederal immigration policy proliferation, summarizing the data and conclusions from our nationwide study of jurisdictions that have passed restrictionist laws. Part II presents the Polarized Change model of immigration regulation, focusing on the key role of issue entrepreneurs and their use of party polarization and ethnic nationalism to promote a restrictionist agenda. Here, the Article situates issue entrepreneurs and their work within the legal, theoretical framework of legislative cascades and political process analysis, highlighting examples of restrictionist legislative activity over the past twelve years. Finally, Part III offers preliminary thoughts on the impact of the Polarized Change model on federalism debates.

Fundamentally, this Article calls for a revision of the conventional narrative for the rise of subnational immigration regulation, and it suggests a cohesive, empirically-based alternative for the phenomenon. It uniquely contributes both legal doctrinal analysis and political science research to the field of immigration federalism, and it may have broader ramifications for federalism analysis generally. Professors Daryl Levinson and Richard Pildes in a recent article argued that constitutional separation of powers analysis is bankrupt without an account of the importance of political parties in creating competition or cooperation between branches of the federal government.¹⁴ Also, Dean Larry Kramer has long maintained that

14. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314 (2006) (“[T]he invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features

political parties are the connective tissue binding federal and state actors, accounting for subfederal concerns in the federal process.¹⁵ While they address different ideas and devices for diffusing national power, the underlying message of both analyses is that theorists must look beyond formal constitutional structures and should study political realities and organizations to fully appreciate basic elements of our constitutional design.¹⁶ In this tradition, we place the focus squarely on the political and extra-legal dimension of immigration lawmaking, arguing that understanding it is indispensable to judicial, scholarly, and public evaluations of state and local involvement.

I. THE EMPIRICAL VALIDITY OF THE CONVENTIONAL MODEL OF STATE AND LOCAL IMMIGRATION REGULATION

The accelerated flurry of subnational lawmaking over the past decade is notable because it occurs against a background context of presumed federal primacy in immigration matters.¹⁷ Since the late nineteenth century, aside from niche areas in which subnational jurisdictions are permitted to enact legislation affecting immigrants, federal law has displaced state and local enactments regulating the entry, exit, conditions of stay of immigrants, and

of the American political system. It has also generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separation of powers.”).

15. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (“Rather than the formal constitutional structures highlighted in Wechsler’s original analysis, federalism . . . has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important) . . .”).

16. *Id.* at 285 (arguing that several institutions and dynamics, including political parties, administrative bureaucracy, the intergovernmental lobby, and states, as recruiting and training grounds, contribute to effective protection of states in the federalist system).

17. While state and local laws regulating movement and fitness for community residence once were commonplace during the nineteenth century in the absence of federal law, after the Civil War, Congress began asserting federal dominion over the field. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993). Since that time, immigration regulation has been primarily a federal exercise, see *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), and *Chy Lung v. Freeman*, 92 U.S. 275 (1875), with some limited leeway for subnational legislation that affects immigrants. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding state E-Verify law for businesses); *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (devolving decisions over public assistance eligibility on the basis of citizenship status to states); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state law prohibiting non-citizens from becoming state troopers).

the enforcement of such laws.¹⁸ More recently, however, states and localities have renewed their interest in immigration regulation. The National Council of State Legislatures reports over 7,000 state immigration proposals over the last five years.¹⁹ States and localities are increasingly considering and passing laws that create state immigration crimes, enact state immigration enforcement schemes, regulate the renting of property to certain noncitizens, penalize businesses for hiring unauthorized workers, and discriminate in the provision of public services.²⁰ In most instances, the stated aim of this restrictive legislation is to discourage entry or residence of unauthorized immigrants, or what many restrictionists have called “attrition through enforcement.”²¹

A. *The Conventional Model*

The conventional explanation for the recent spate of state and local laws should be familiar to anyone paying attention to immigration policy. It holds that policy stalemate at the federal level, combined with the pressure created by the public policy challenges of recent and rapid demographic changes, compel states and localities to legislate in a field they have no choice but to enter. This sentiment was neatly encapsulated by Governor Jan Brewer of Arizona in her signing statement accompanying the passage of S.B. 1070, the law creating a state immigration enforcement scheme and providing state criminal penalties for immigration violations (recently enjoined, in part, by the Supreme Court²²):

The bill I’m about to sign into law – Senate Bill 1070 – represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix....The crisis caused by illegal immigration and Arizona’s porous border.

18. Neuman, *supra* note 17, at 1896–97.

19. *NCSL 2011 Report on State Immigration Laws*, NAT’L CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/default.aspx?TabId=23960> (last visited Oct. 15, 2012).

20. *State Laws Related to Immigration and Immigrants*, NAT’L CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last visited Oct. 15, 2012) (summarizing immigration legislation introduced in state legislative bodies).

21. Arizona’s SB1070 explicitly invoked this frame in Section 1 of the law: “The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.” S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

22. *Arizona v. United States*, 132 S. Ct. 2492 (2012). (enjoining three out of four challenged provisions, but declining to enjoin provision directing police officers to determine immigration status on lawful stops and arrests).

We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction and misguided policy have created a dangerous and unacceptable situation.²³

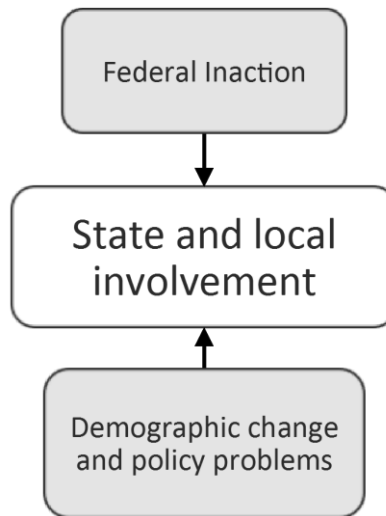
Notably, Governor Pete Wilson conjured this same rhetoric when framing the need for California's Proposition 187 in 1994.²⁴ Wilson promoted the so-called "Save Our State Initiative" by depicting California as the victim of federal failure.²⁵

The conventional model of subnational immigration regulation is represented in Figure 1 below:

23. Press Release, Office of the Governor, Statement by Governor Jan Brewer on the signing of Senate Bill 1070 (Apr. 23, 2010), *available at* http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf; *see also* Letter from Janet Napolitano, Governor of the State of Ariz., to Hon. Jim Weiers, Speaker of the House, (July 2, 2007), *available at* <http://www.countysupervisors.org/uploads/07-07-02%20HB%202779%20Statement.pdf>. ("Immigration is a federal responsibility, but I signed HB 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs.").

24. Proposition 187, codified in CAL. HEALTH & SAFETY CODE § 130 (excluding undocumented individuals from receiving any health care services from publicly-funded health care facilities, except emergency medical care as required by federal law, and requiring that facilities notify and provide information to the State Director of Health Services, the California Attorney General, and the INS regarding undocumented individuals who seek health care services); *see also* OFFICE OF THE CAL. SEC'Y OF STATE, CAL. BALLOT PAMPHLET GEN. ELECTION NOV. 8, 1994, 54–55 (1994), *available at* http://library.uchastings.edu/ballot_pdf/1994g.pdf (containing argument in favor of proposition 187 and rebuttal).

25. *See* Peter Skerry, *Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?*, 25 *PUBLIUS* (ISSUE 3) 71, 72 (1995).

Figure 1. Conventional Model of Subnational Immigration Legislation

The chief virtue of the conventional model is its simplicity and intuitive appeal;²⁶ in other words, it just seems right. In addition to the widespread acceptance that immigration policy has reached a stalemate at the national level, it also makes intuitive sense that rapid migration and demographic change are causing significant social dislocation and prompting redistribution of some public goods. First, current economic studies suggest that the fiscal benefits of immigration are more likely to be concentrated at the national level while any short-term fiscal costs are more likely to be borne by specific localities, particularly with respect to the provision of public education, social services, and emergency room care.²⁷

Second, it is evident that immigrants in recent years have been moving to “new destinations”—areas with little or no history of immigrant settlement in the past century.²⁸ The emergence of these new destinations helps augment the narrative of rapid, recent demographic change that many assume to cause state and local legislative reactions. These settlement

26. While some may argue that the conventional understanding also includes an appreciation of the role of politics, *infra* Part II, we explore the heretofore limited theoretical and empirical development of these claims.

27. See, e.g., COMMITTEE ON POPULATION & BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* (James P Smith & Barry Edmonston eds., 1997).

28. Audrey Singer, Susan Wiley Hardwick & Caroline B. Brettell, *TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA* (Brookings Institution Press, 2008). These so-called “new destinations” include places ranging from rural Kansas and North Carolina to suburbs in Long Island and Georgia that have had little recent history of immigration.

patterns have brought renewed attention to issues such as day laborers, unlicensed businesses, overcrowded housing, and illegal immigration. And, judging from news coverage of conflicts and tensions in these new destination areas, the presence and growth of low-skilled (and often unauthorized) immigrant populations would seem to pose challenges for local governance.²⁹

Upon closer evidentiary analysis, however, this conventional model does not hold. In our other work, we constructed a dataset of over 25,000 municipalities and all fifty states and, using multivariate regression analysis, tested the salience of various factors hypothesized to induce state and local policy response on immigration.³⁰ As summarized below in Appendix A, our analysis revealed that the demographic factors commonly assumed to spur subfederal policy responses were not salient in predicting or explaining the recent rise of such regulations. Instead, contexts of local partisanship emerged as the highly salient factor explaining the spread of these laws, with Republican-heavy areas much more likely to pass restrictive legislation than Democrat-heavy areas.

Republican-heavy areas proved to be significant because they provide ripe opportunities for policy entrepreneurs to propose and pass policies by framing undocumented immigration as one of the most significant problems for local governance. For instance, in 2006 and 2007, six cities in California (Apple Valley, Costa Mesa, Escondido, Lancaster, Santa Clarita, and Vista) passed restrictive ordinances on matters ranging from day laborers to

29. See, e.g., Paul Vitello, *As Illegal Workers Hit Suburbs, Politicians Scramble to Respond*, N.Y. TIMES, Oct. 6, 2005, <http://www.nytimes.com/2005/10/06/nyregion/06immigrate.html>; Bob Dart, *Minutemen Shadow Town's Day Labor Site*, ATLANTA J. CONST., April 5, 2006, http://www.galeo.org/story.php?story_id=0000001057.

30. See S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES (Monica Varsanyi, ed. 2011); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: Its Political Underpinnings and Legal Implications* (working title) (manuscript in preparation); see also Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Restrictive State and Local Immigration Laws: Solutions in Search of Problems*, American Constitution Society Issue Brief at 6–11 (November 15, 2012) available at <http://www.acslaw.org/publications/issue-briefs/restrictive-state-and-local-immigration-laws-solutions-in-search-of-proble> (summarizing empirical evaluation of the salience of the following factors proffered by scholars, judges media, and elected officials as causing state and local policy response: population of new immigrants and growth of Latino and foreign-born populations; high proportions of linguistically-isolated households; overcrowded housing; Latino share and naturalized share of the citizen population; economic stress and relative group deprivation; state-level policy climate; local economic interests; and party composition of the electorate.).

employers, and to landlords.³¹ These various municipalities shared little in the way of large-scale recent immigration or rapid changes in local unemployment, but they did share one common characteristic: electorates that leaned heavily Republican (with a party registration advantage ranging from sixteen percentage points to thirty percentage points in these cities) in a state where registered Democrats had an eight percentage-point advantage over Republicans.³² The political opportunities that Republican-heavy municipalities present to policy entrepreneurs on immigration restriction continued through 2010, as the *Los Angeles Times* reported on the successful attempts of a local tea party activist in getting Republican-heavy cities in Southern California such as Temecula and Murietta to pass restrictive measures after failing to do the same in larger, politically diverse cities such as Riverside and Ontario.³³

Finally, in cases where policy entrepreneurs are not involved in local efforts, political ambition may be a critical factor, as Republican-heavy districts offer the chance for primary challengers to mobilize party activists who care intensely about the issue of illegal immigration. This was evident in Arizona as far back as 2004 and 2006, as long-standing Republican incumbents such as Congressman Jim Kolbe faced competitive primary elections from challengers who focused on immigration and border-control issues.³⁴ These intraparty dynamics continued through 2010, as Governor Jan Brewer and Senator John McCain tacked to the far right on immigration in order to fend off primary challengers.³⁵

31. These are based on our data collection, which we describe in Appendix A.

32. For State party registration data, see CAL. SEC^Y OF STATE, REPORT OF REGISTRATION OCT. 23, 2006 (2006), available at <http://www.sos.ca.gov/elections/ror/ror-pages/15day-gen-06/hist-reg-stats.pdf>. Local party registration data for municipalities can be obtained from the firm Aristotle, Inc.

33. Phil Willon, *Conservative Inland Empire Cities Crack down on Illegal Workers*, L.A. TIMES, Feb. 14, 2011, <http://articles.latimes.com/2011/feb/14/local/la-me-0212-e-verify-20110214>.

34. See Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES, Oct. 15, 2006, http://www.nytimes.com/2006/10/15/magazine/15immigration.html?pagewanted=all&_r=0.

35. See Katie Cobb, *Immigration Law Breathes Life Into Brewer's Re-Election Campaign*, FOX NEWS (June 12, 2010), <http://www.foxnews.com/politics/2010/06/10/immigration-law-breathes-life-brewers-election-campaign/>; Russell Goldman, *John McCain Border Shift: "Complete Danged Fence"*, ABC NEWS (May 11, 2010), <http://abcnews.go.com/Politics/john-mccain-immigration-reversal-complete-danged-fence/story?id=10616090>.

II. A POLITICAL THEORY OF LEGISLATIVE ACTION: THE POLARIZED CHANGE MODEL

While partisanship has a statistically stronger relationship than various demographic factors in explaining legislative change, completing the analysis requires us to determine how these political factors actually work to produce such policy expressions. Notably, the kinds of political explanations we offer here need to go beyond ad-hoc pronouncements on the importance of politics, which have pointed to disparate factors such as political interest groups,³⁶ legacies of Jim Crow,³⁷ and racial gaps between voters and residents.³⁸ Instead, we use the conclusions drawn from our statistical findings to develop a more nuanced “polarized change” model of subnational immigration regulation, proffering our theory on why partisanship matters and how the political process has shaped both federal and state legislative efforts. This new model, grounded in theoretical frameworks provided by legal and political science scholarship, accounts for our findings on partisanship and demography. It also incorporates qualitative evidence gathered from news reports, interviews, and congressional dynamics that highlight the work of selected policy activists in immigration law.

The conventional model described in Part I is not just lacking empirically; it is also lacking theoretically. It seeks to reduce the phenomenon of state and local action to the combination of policy pressures from below that confronts legislative inaction from above. But, in the case of immigration policy, the status quo of legislative inaction is not the same as having a blank policy slate on immigration. Since nearly its founding, the federal government has passed legislation on citizenship and naturalization, and since 1952, it has relied on the Immigration Nationality Act, with many statutory provisions that have been added or amended over the years.³⁹ In

36. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>. Notably, NPR has retracted one of the central claims made in the piece regarding the role of the Corrections Corporation of America.

37. Martin Luther King III & Richard Trumka, *Alabama's Immigration Law: Jim Crow Revisited*, CNN.COM (Nov. 17, 2011, 11:23 AM), <http://www.cnn.com/2011/11/17/opinion/trumka-king-civil-rights-alabama/index.html>.

38. Daniel Gonzalez, *SB 1070 Backlash Spurs Hispanics to Join Democrats*, ARIZ. REPUBLIC, June 8, 2010 (“Arizona is different [from California] in that . . . the Latino vote is lower, about 12 percent versus 21 percent.”).

39. See, e.g., Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (abolishing the national original quota system in favor of annual Eastern and Western Hemisphere ceilings); Farm Labor Contractor Registration Amendments of 1974, Pub. L. No.

addition to statutory provisions on the matter, immigration is also subject to the various regulatory provisions and enforcement priorities of the executive branch and subject to congressional oversight and budgetary authority. By contrast, the status quo on issues such as publicity rights or driverless vehicles are truly “blank slates” at the national level, with no federal statutory or regulatory provisions on the matter.

Moreover, in defining federal failure, restrictionists have discounted the role of the federal executive, focusing solely on the activity of the legislature.⁴⁰ Thus, discretionary decisions by the President and the Department of Homeland Security to prioritize enforcement and tolerate some level of unlawful presence and migration are necessarily—and understandably—absent from restrictionists’ description of federal dynamics. Federal gridlock is therefore exclusively framed as congressional gridlock, and legislative enactment is promoted as the only constitutionally significant aspect of federal immigration policy.

Defenders of the conventional model of subnational legislation may concede that there is no policy vacuum on immigration at the national level but still contend that existing federal laws and regulations, many enacted decades ago, are ill-equipped to solve the policy challenges posed by recent immigrants, particularly low-skilled, unauthorized immigrants from Mexico. However, as we have already seen, the empirical evidence offers little to support the contention that restrictive legislation is more common in places with recent arrivals, or with more Mexican immigrants, or with more Spanish-dominant households, or with more objective conditions for labor competition between immigrants and the native born.⁴¹

Second, as many established models in the literature on public policy and public opinion have shown, policy problems are not self-evident. Rather, they depend on problem definition, attribution of blame, and political

93-518, 88 Stat. 1652 (adding a criminal penalty for farm labor contractors who knowingly hire undocumented workers); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (changing the preference system for admission of immigrants to the United States and providing for administrative naturalization).

40. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844 (2007) (“Both the public debate and existing scholarship typically view illegal immigration as an enforcement problem that needs to be solved. The high level of illegal immigration is seen as reflecting the government’s failure to enforce the existing immigration rules.”); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1827–42 (2011) (noting that while legislation potentially identifies several million removable persons, other aspects of the enforcement system—arrest, prosecution, and adjudication—only deal with a fraction of that pool).

41. See *infra* Appendix B., Table B1.

mobilization.⁴² As we have already demonstrated from our cross-sectional analysis of localities and states, policy challenges related to increased immigration constitute neither a necessary nor a sufficient cause for restrictive legislative action at the subnational level. Furthermore, economic rationales that stress the importance of wage competition and local fiscal pressures are unable to account for the fact that restrictive efforts at the local level rose sharply in 2006, during a time of low unemployment and booming economic growth.

Finally, the conventional explanation assumes the existence of federal failure, but provides no empirical or theoretical explanation for federal inaction. If the factors that explain federal inaction on new immigration legislation are wholly unrelated to the factors that can explain local action, then having a two-tiered explanation may be sufficient—with partisan gridlock explaining the former and demographic factors explaining the latter. However, we find that this is not the case. Indeed, as we argue in the next section, two sets of factors—what we characterize as party polarization and ethnic nationalism—when mobilized by issue entrepreneurs, account for both federal inaction and the rise in subnational legislation, and thus have greater explanatory value than attempts to describe the two sets of phenomena in a piecemeal manner.

In response, as an alternative to the empirically and theoretically lacking conventional model, we propose a model of polarized change that incorporates our findings on the saliency of partisanship and allows for the possibility that a single mechanism influences both national and subnational dynamics. The Polarized Change model draws on major theoretical traditions in the public policy scholarship on legislative change, such as the multiple streams tradition and the punctuated equilibrium framework of policy change,⁴³ and relates it to existing work in legal scholarship on legislative cascades⁴⁴ and private lawmaking.⁴⁵ Much like in these other frameworks, we argue in our model of polarized change that the entire process of policy change on immigration—from opinion formation among

42. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1 (2010); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738, 765–66 (1997).

43. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); FRANK BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

44. See Kuran & Sunstein, *supra* note 42.

45. See Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161 (2010).

voters to agenda setting and legislation at the national and subnational levels—is shaped powerfully by the work of political parties and issue entrepreneurs (those who do the work of promoting the salience of a particular issue, offering particular frames for understanding those issues, providing particular solutions, and identifying opportunities and venues for policy change).

Our framework highlights the influence of these issue entrepreneurs in creating optimal conditions for subnational immigration regulation, framing the narrative necessary for judicial and political acceptance of restrictionist legislation, and targeting specific jurisdictions with partisan conditions that are ripe for enacting such regulation, with an eye to more widespread adoption. The key insight with this model is the connectedness—the unitary nature—of both the dynamics at the federal and subfederal levels. Instead of conceiving of these two aspects as independently moving parts, we suggest that both are influenced concurrently. The stalling of the one (federal legislation) provides the constitutional and political leverage for activity at the other (state and local policies). Further, our alternate model showcases how issue entrepreneurs have been able to intensify interparty polarization and post-9/11 ethnic nationalism to effectively promote their causes. To be clear, our description of this process is not intended, by itself, as a negative judgment on the work of these entrepreneurs; rather, we seek to present a more realistic appraisal of the mechanism producing subnational immigration regulation.

A. *Description of the Polarized Change Model*

The underlying premise of the Polarized Change model is that policy challenges resulting from demographic change do not inexorably produce legislative efforts at policy change. Calls for policy change emerge even without underlying objective conditions such as rapidly growing immigrant populations (these are not necessary conditions); further, objective conditions often do not lead to efforts at local legislation (these are not sufficient conditions). What is more important than the objective basis for a policy problem is its *perceived existence and importance* among those who are critical to the legislative process.⁴⁶

46. See generally Kuran & Sunstein, *supra* note 42, at 741–47 (arguing that cognitive biases—like susceptibility to availability cascades, in which limited, available information becomes dominant and accepted—that affect officials and those advocating for change can lead to suboptimal policy outcomes); Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About*

In Figure 2, we situate the role of issue entrepreneurs in the larger process of immigration policy change. While one may typically think of elected representatives as key actors on legislation, we show that in the case of state and local legislation on immigration, issue entrepreneurs play an outsized role. These key actors coordinate action across local jurisdictions and between levels of government. In various jurisdictions, restrictionist issue entrepreneurs also create model legislation that can be easily mimicked, and they craft such legislation to test the limits of constitutional constraints at the subfederal level.⁴⁷ Critically, based on our empirical analysis and theoretical reasoning, we eliminate the “demographic change and public policy problems” found in Figure 1 (Conventional Model), and we replace it with the “perceived existence of policy problem,” underscoring the subjective nature of such claims and their production through a process of politicization.⁴⁸

To be clear, we are not claiming that issue entrepreneurs are solely responsible for the way that immigration policy has developed at the national and local level since 2001. Instead, they play a central role in taking advantage of opportunities that are themselves generated by two other historical and institutional factors: *party polarization* (which includes the rise of interparty divisions in Washington D.C. after 2000 and the elimination of moderates within the Republican Party through competitive party primaries after 2004) and *ethnic nationalism* (which encapsulates the twin rise in racial and cultural antipathy in immigration discourse and concerns about homeland security after the September 11, 2001 attacks). As we show in the next section, party polarization presented the opportunity to shift immigration policy away from a bargaining dynamic among varied interest groups and legislators where compromise is possible to a pattern of entrenchment where interparty divisions engender gridlock through the use of filibusters.⁴⁹ And the rise of national security concerns presented

Federalism? An Experimental Test, 4 J. EMPIRICAL LEGAL STUD. 589 (2007) (arguing that framing of problems by “elites” affects how citizenry views a problem and its solution).

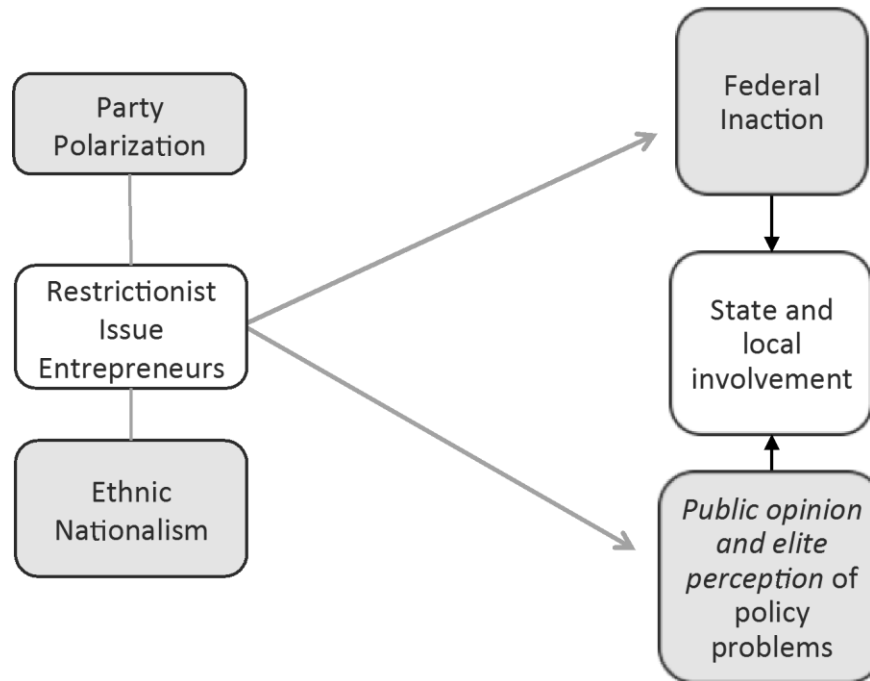
47. See, e.g., Immigration Reform Law Institute, Model Federal, State, and Local Laws, available at <http://irli.org/laws>; IMMIGRATION REFORM LAW INSTITUTE, PRO-ENGLISH MODEL LOCAL ORDINANCE (2006), available at <http://irli.org/system/files/Pro-English%20Model%20OEO.pdf>.

48. See *supra* note 42 and accompanying text.

49. See generally DANIEL TICHENOR, DIVIDING LINES (2002) (arguing that the extent to which parties can prevent “strange bedfellow” coalitions depends, to some extent, to whether the issue at hand has one dimension on which parties can differentiate, or two dimensions that typically lead to instability in decisionmaking). On issues of low public salience, such as tax policy, Congressional logrolls along committee lines and interest group access can play more prominent roles. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 193–223 (1990).

opportunities to expand the rhetorical scope of ethnic nationalism and its salience to a wider population.

Figure 2. Polarized Change Model of Subnational Immigration Legislation



Still, the mere existence of these two factors does not automatically lead to policy change. In most cases, immigration issue entrepreneurs remain the critical actors: they challenged moderate Republicans well before the Tea Party's rise in 2009, they helped to shift immigration policy from an interest group bargain to a partisan stalemate, and they were early champions of this "border security" variant of ethnic nationalism, mobilizing constituents and pressuring legislators to resist the existential threat represented by immigrants.⁵⁰ In addition to capitalizing on these factors to block bipartisan legislation at the national level, these issue entrepreneurs have also played an important role at the subnational level: identifying the places where

50. See, e.g., *Shortfalls of the 1986 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 10 (2007) (statement of Rosemary Jenks, Director of Government Relations, NumbersUSA) (describing terrorists gaming the U.S. immigration system), available at <https://www.numbersusa.com/content/files/pdf/2007-04-19%201986%20IRCA%20Mistakes.pdf>.

opportunities are greatest, offering model legislation and political counsel to ensure legislative passage, and lending legal expertise to ensure that the provisions have a colorable constitutional basis.⁵¹

B. The Polarized Change Model in Theory and Practice

In this section, we flesh out the details of the Polarized Change model as it applies to immigration legislation at the national and subnational levels. First, we use existing theoretical frameworks on policy proliferation and federalism dynamics to identify and describe the class of key policy actors we call issue entrepreneurs. Then, we provide a few examples from the past decade of issue entrepreneurs in action, noting the two contextual factors that have structured the opportunities for legislative change on immigration since 2001: the rise of party polarization and ethnic nationalism.

To develop this narrative, we take a close look at key instances of Congressional and subnational immigration action. Thus, complementing the quantitative data used to discredit the demographic explanations of the conventional model, here we analyze qualitative data from news reports and in-depth interviews to show how issue entrepreneurs work in the immigration legislative landscape.⁵² Our analysis here gets into the minutiae of the policy and political work of key actors and events in immigration lawmaking. This rich description of the political capture and mechanism of policy change is vital to understanding the deficits of the conventional model and evaluating the difference the polarized change model makes for constitutional evaluation of subnational policy.

1. The Agents of Polarized Change—Restrictionist Issue Entrepreneurs

Who are these issue entrepreneurs on immigration, and how did they mobilize and coordinate action at the national and local levels? One way to think of these actors would be to include those whose activism has

51. See *infra* Part II.B.

52. Our counterfactual analysis suggests that without the work of these vital actors, the immigration landscape—both nationally and subnationally—would appear drastically different. That is, without these actors, we would expect to have passed comprehensive immigration reform, and decreases in subnational immigration policymaking. Due to space constraints, our discussion of the qualitative findings is abridged here. For more the role of party polarization, ethnic nationalism, and issue entrepreneurs. See generally KARTHICK RAMAKRISHNAN, POLARIZED CHANGE: THE POLITICIZATION OF U.S. IMMIGRATION AT THE STATE AND LOCAL LEVEL (working title) (manuscript in preparation).

generated national news, and who seek to influence policy on immigration beyond their immediate jurisdiction. Such a definition, however, would produce a list that is extremely long, including: *local representatives* such as Lou Barletta (former mayor of Hazleton, PA); *law enforcement officials* such as Joe Arpaio of Maricopa County, AZ; *state legislators* such as Russell Pearce (R-AZ) and Virgil Peck (R-KS); *governors* such as Jan Brewer (R-AZ) and Robert Bentley (R-AL); *U.S. Representatives* such as Tom Tancredo (R-CO), Jim Sensenbrenner (R-WI), and Steve King (R-IA); *advocacy groups* such as the Federation for American Immigration Reform and NumbersUSA; *research organizations* such as the Center for Immigration Studies; national *radio personalities* such as Glenn Beck, John Kobylt, and Kenneth Chiampou; *television personalities* such as Lou Dobbs (formerly of CNN) and Bill O'Reilly (Fox News); *legal advocates* such as Kris Kobach' and other organizations such as the American Legislative Exchange Council whose concerns lie well beyond immigration but who have nonetheless played a role in coordinating restrictive legislative efforts across states on the issue.

Such a broad definition is not only unwieldy from an empirical perspective, it is also unhelpful for our theoretical model of polarized change, which reserves the label of issue entrepreneur for those actors who have been involved at both levels and have been central to proliferation at the subnational level (Figure 2). While we acknowledge that all these players influence immigration policy, we focus on this narrower set because of their multilevel reach and forward-thinking legislative strategy. As we argue in Part III, the activities of these actors are much more consequential for considerations of federalism because they challenge standard assumptions that undergird federalism analysis generally and immigration federalism analysis specifically.

We arrive at a narrower, theoretically cogent set of actors by applying and modifying existing legal frameworks for policy instantiation. Using Professors Sunstein and Kuran's work on availability cascades,⁵³ Professor Catherine Carpenter's elucidation of policy proliferation,⁵⁴ and Michael Mintrom's work on policy entrepreneurs,⁵⁵ we establish the following key criteria for identifying restrictionist issue entrepreneurs for our model. First, issue entrepreneurs take advantage of limited public knowledge about immigration policy and problems. Relatedly, they link restrictionist policy goals with the rhetoric of state and local autonomy. Third, they are able to

53. Kuran & Sunstein, *supra* note 42.

54. Carpenter, *supra* note 42.

55. Mintrom, *supra* note 42.

recruit the wider set of actors described above to their cause. Finally, these actors work in a network, each specializing in a set of tasks that, when coordinated with other entrepreneurs, leads to policy proliferation at the local level and timely legislative gridlock at the national level.

Applying this framework, the identities and achievements of restrictionist issue entrepreneurs comes into clearer focus. Based on their consistent and influential work, we identify five key entrepreneurial individuals and organizations: (1) Tom Tancredo (U.S. Representative from Colorado and a 2008 presidential candidate), (2) Kris Kobach (legal counsel to restrictionist organizations and jurisdictions and coauthor of Arizona's SB1070 law), (3) Lou Dobbs (former host of a prime-time CNN program), and the organizations, (4) the Federation for American Immigration Reform (FAIR), and (5) NumbersUSA. Below, we first amplify the theoretical foundation of our selection of these particular entrepreneurs. Second, to familiarize readers, we provide a brief description of each of these key figures and the roles they've played in national and subnational immigration policy over the past decade.

The idea of interested private parties and organization that coalesce around an issue or cause and then employ various methods to influence public policy related to that cause is well-studied.⁵⁶ These descriptions distinguish a distinct species of policy actors who seek policy change by helping frame challenges, disseminating information (or misinformation), networking across jurisdictional lines, and raising money for such

56. See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 17 (2010); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (describing the influence of norm entrepreneurs in changing domestic attitudes about equality); Kuran & Sunstein, *supra* note 42, at 687 (describing social agents who understand availability heuristics and attempt to trigger availability cascades to achieve policy goals); Mintrom, *supra* note 42, at 739 (identifying policy entrepreneurs as a class of policy actors who seek dynamic policy change, and noting that policies are more likely to be considered and approved when such actors are present); Orbach et al., *supra* note 45, at 1163 (discussing the work of private lawmakers who use gun rights as a policy-vehicle to effect a broader states' rights platform); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 90 (1999) (describing persons who are eager to exploit group pathologies to achieve an end). Indeed, even the use of the term "entrepreneur" to describe that population has been prominent in the literature. Both legal and political science commentators have identified the work and importance of "availability entrepreneurs," "policy entrepreneurs," "political entrepreneurs," "social entrepreneurs," "norm entrepreneurs," and "private lawmakers" in galvanizing lawmaking.

activities.⁵⁷ Other scholars have even noted immigration entrepreneurs (Kris Kobach) by name.⁵⁸

The “issue entrepreneurs” we identify in the Polarized Change model are the evolved descendants of these political actors. The descriptor “issue” emphasizes that these actors appear to truly care about, and believe in, the substantive restrictionist position they attempt to achieve. Immigration issue entrepreneurs do not seem to be using a restrictionist agenda as a convenient vehicle to activate a broader states or local rights platform.⁵⁹ As such, they not only promote their policy vision at the subfederal level, they concurrently undermine other state and local efforts aimed at integrating or ameliorating conditions for unauthorized immigrants.⁶⁰ In other words, they care about state and local power only to the extent it serves their substantive policy goals.

The work of restrictionist issue entrepreneurs at the subnational level is a real-time illustration of Professors Sunstein’s and Kuran’s analysis of the influence of information deficits and reputational concerns on public policy.⁶¹ As they note, in a policy debate, sometimes advocates for the objectively weaker or even empirically incorrect side can triumph in the legislative and political sphere by exploiting the cognitive biases of the public and elected officials.⁶² In such cascades, interested persons take

57. See, e.g., Mintrom, *supra* note 42, at 739–41; Orbach et al., *supra* note 45, at 1167; Kuran & Sunstein, *supra* note 42, at 714.

58. Orbach et al., *supra* note 45, at 1163 (noting that federal policies in immigration are prime targets for private lawmakers) and at 1166 (identifying former law professor, and now elected official, Kris Kobach as a private lawmaker in the immigration field).

59. See, e.g., Hills, *supra* note 56, at 36 (“Few with influence in the political process care about promoting state power as an end in itself.”). But see Orbach et al., *supra* note 45, at 1178 (arguing that private lawmakers in the gun rights area use those laws as a way to return the Supreme Court to a pre-New Deal Congressional power jurisprudence).

60. The Immigration Reform Law Institute, the legal arm of the Federation for American Immigration Reform, challenged the provision of in-state tuition for unauthorized immigrant students and municipal identification cards for all city residents regardless of their immigration status. John Coté, *Judge Tosses Challenge to S.F. ID Card Plan*, S.F. CHRON., October 15, 2008, <http://www.sfgate.com/bayarea/article/Judge-tosses-challenge-to-S-F-ID-card-plan-3265362.php>; David Savage, *Supreme Court Allows California to Grant In-State Tuition to Illegal Immigrants*, LA TIMES, June 6, 2011, <http://articles.latimes.com/2011/jun/06/news/sc-dc-0607-court-tuition-20110607>.

61. Kuran & Sunstein, *supra* note 42, at 685–701 (discussing how availability cascades can generate widespread mistaken beliefs because of informational availability and reputational concerns, and the susceptibility of the public and elected officials to cognitive biases in information processes).

62. *Id.* at 714; see also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 76 (2001) (describing how, in the absence of their own private information, people tend to follow others, and this process helps reach extreme policy

advantage of limited, and often incorrect, information about an issue or apparent problem to drive public policy.⁶³ Foremost amongst the informational deficits exploited by restrictionist issue entrepreneurs are the generally held beliefs that undergird the conventional model of subnational regulation: that, in any particular jurisdiction, immigrants are causing uniquely insurmountable public policy programs that require restrictionist legal responses—in other words, the same propositions undermined by our empirical inquiry.

These informational claims, however, are particularly sticky, persisting despite the experience of jurisdictions passing immigration legislation—from Riverside, New Jersey, and the states of Oklahoma and Alabama—which have all suffered greater economic distress *after* the legislation passed and *subsequently* drove out labor and consumer sources.⁶⁴ Similarly, the idea of immigrant criminality motivating laws like Arizona’s SB 1070,⁶⁵ has been proven to be a “myth.”⁶⁶ Despite a marked drop in violent crime in Arizona, issue entrepreneurs, as purveyors and disseminators of immigration “facts,” have consistently galvanized receptive constituencies

positions); Talley, *supra* note 56, at 90 (discussing how “social entrepreneurs” are eager to exploit group pathologies).

63. Kuran & Sunstein, *supra* note 42, at 685–701; *see also* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 76 (2001) (describing how, in the absence of their own private information, people tend to follow others, and this process helps reach extreme policy positions); Talley, *supra* note 56, at 90 (discussing how “social entrepreneurs” are eager to exploit group pathologies).

64. *See* Patrik Jonsson, *Why Republicans Are Doing an About-face on Tough Alabama Immigration Law*, CHRISTIAN SCIENCE MONITOR, Nov. 16, 2011, <http://www.csmonitor.com/USA/Politics/2011/1116/Why-Republicans-are-doing-an-about-face-on-tough-Alabama-immigration-law> (“Prof. Samuel Addy at the Center for Business and Economic Research at the University of Alabama recently predicted that HB 56 will reduce the Alabama economy by \$40 million as income and spending by both illegal and legal Hispanic immigrants will decline. What’s more, employers face troves of fresh paperwork and licensing requirements to comply with the law that they say will potentially hurt business.”); Peter J. Spiro, *Be Careful What You Wish For*, N.Y. TIMES, Oct. 4, 2011, <http://www.nytimes.com/roomfordebate/2011/10/04/should-alabama-schools-help-catch-illegal-immigrants/be-careful-what-you-wish-for-alabama> (arguing that Alabama’s law, driving out immigrants, will force the state to learn the importance of immigrants to its economic well-being); *PBS NewsHour: Alabama’s Immigration Law: Assessing the Economic, Social Impact* (PBS broadcast Oct. 13, 2011) (transcript available at http://www.pbs.org/newshour/bb/business/july-dec11/alimmigration_10-13.html).

65. *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) §§ 2–6 (providing state criminal penalties for unlawful presence and unauthorized solicitation of work).

66. Rubén G. Rumbaut et. al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (Oct. 10, 2012, 12:02 PM), <http://www.migrationinformation.org/Feature/display.cfm?id=403>.

with their message of the danger posed by migrants.⁶⁷ Thus, similar to the policy actors described by other scholars, restrictionist issue entrepreneurs are able to succeed and endure, despite championing empirically dubious claims.⁶⁸

The issue entrepreneurs' key intuition—connecting these substantive misperceptions and subnational policy proliferation—is exploitation of the discourse of state and local rights for their particular policy ends. Restrictionist issue entrepreneurs are able to effectively deploy federalism tropes to rally local majorities and elected officials to their cause. Recent political science research suggests that federalism-based framing of policy issues by political elites are consequential to citizens' beliefs and voting.⁶⁹ As such, the ability of restrictionist issue entrepreneurs to target willing elected officials, and supply those officials with federalism-based rhetoric to defend substantive immigration enforcement positions, measurably influences the failure of federal proposals.⁷⁰ Even if national majorities favor certain aspects of federal immigration reform,⁷¹ significant constituencies within that diffuse majority may be convinced to oppose specific national reforms to preserve state involvement in enforcement schemes. This may be especially true after enactment of a state or local policy, as citizens who previously were agnostic towards restrictionist legislation may now support the restrictionist laws, not because of the substantive policy position, but to protect state and local authority.

In addition, Carpenter notes that a few, intensely interested actors are sufficient to trigger a legislative epidemic, if those actors are properly credentialed and positioned.⁷² A key characteristic of this small group, she maintains, is the ability to recruit other credentialed and influential actors, like the larger group of officials, organizations, and media personalities listed above. Because of the opportunities presented by party polarization, this broader set of elected actors is easy to discover for immigration policy

67. Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 20, 2010, at A18, available at <http://www.nytimes.com/2010/06/20/us/20crime.html?pagewanted=all>.

68. Cf. Carpenter, *supra* note 42, at 1, 37, 56; Kuran & Sunstein, *supra* note 42, at 714 (noting that the objectively weaker side may triumph by exploiting cognitive biases).

69. Kam & Mikos, *supra* note 46, at 592–601.

70. Cf. *id.* at 601 (noting that the federalism rhetoric of politicians is salient in influencing voter attitudes towards federal legislation).

71. Scott Keeter, *Where the Public Stands on Immigration Reform*, PEW RESEARCH CENTER (Nov. 23, 2009), <http://pewresearch.org/pubs/1421/where-the-public-stands-on-immigration-reform>.

72. Carpenter, *supra* note 42, at 29.

purposes. State and local officials naturally fit into the entrepreneurial framework as they are key facilitators and molders of public perception.⁷³ With their considerable experience in channeling and mobilizing public opinion for electoral gains, these officials can effectively frame and promote the issue entrepreneurs message that demographic “facts” cause urgent policy problems.⁷⁴

Finally, immigration issue entrepreneurs must be appropriately networked, showcasing the ability—as a collective whole—to work across multiple jurisdictions, both among the many states and localities, and between federal and subfederal levels.⁷⁵ Each of these actors also performs a specialized set of critical roles: lobbying federal legislators to block legislative efforts, designing model legislation for the state and local levels, offering legal counsel and expertise, framing and making immigration issues salient to the general public, mobilizing and informing issue activists, and keeping unseemly, race-specific immigration discourse out of mainstream.

As we describe in detail below, the five issue entrepreneurs we select based on this framework may fill many of these roles within a networked system. Further, as a group, they evince the ability to fulfill the prerequisites for policy proliferation and legislative cascades described in the literature, using a unique combination of demographic “facts” and federalism rhetoric uniquely available in the immigration context.

(1) Tom Tancredo played a sustained and crucial role in organizing the legislative opposition to bipartisan federalism solutions that included a path to citizenship for the unauthorized immigrant population in the United States. As early as 2001, he publicly countered White House attempts to gather support for a legalization program after the State Visit of Vicente Fox to Washington, D.C.⁷⁶ Subsequently, Tancredo recruited new members into the Immigration Reform Caucus, a group that successfully prevented or delayed bipartisan attempts at federal immigration reform by the White

73. Hills, *supra* note 56, at 21 (“State and local politicians, however, are natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems. . . . The entrepreneur can transform a social condition that everyone has taken for granted into a problem that must be addressed by recategorizing the issue and offering different comparisons for judging whether the issue is being acceptably handled.”).

74. Carpenter, *supra* note 42, at 40.

75. Mintrom, *supra* note 42, at 739, 760.

76. *Newshour with Jim Lehrer, Immigration Challenge* (PBS television broadcast Sept. 6, 2001) (Representative Tancredo discussing his opposition to various aspects of then-proposed immigration reforms) (transcript available at http://www.pbs.org/newshour/bb/congress/july-dec01/immigration_9-6.html).

House and Senators Sam Brownback (R-KS) and Ted Kennedy (D-MA).⁷⁷ Tancredo's success in blocking bipartisan legislation on immigration continued through the 2006 and 2007 efforts at comprehensive immigration reform as he rallied conservatives in the House and Senate to oppose provisions in the bill that would lead to an eventual path to citizenship.⁷⁸ During his time in Congress he commanded a sizable group of legislatures in the Immigration Reform Caucus, providing him the power to access party leadership and influence House votes.⁷⁹ He also entered the Presidential race in 2007, seeking to force other candidates to address the topic of illegal immigration.⁸⁰

Finally, Tancredo has also been heavily involved in promoting the salience of immigration across various states and localities. He did so by introducing bills and amendments to withdraw federal funding from so-called "sanctuary cities,"⁸¹ proposing that legislators and mayors who championed such legislation face criminal charges,⁸² urging the Department of Homeland not to undermine the enforcement efforts of groups such as the Minuteman Project,⁸³ and lending support to legislative efforts against illegal immigration in states such as Pennsylvania⁸⁴ and Arizona.⁸⁵

77. See, e.g., Immigration, Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 107th Cong. (2002). Congressman Tom Tancredo chaired the Immigration Reform Caucus from its creation in May of 1999 until February of 2007. *About Us*, IMMIGRATION REFORM CAUCUS, <http://irc.bilbray.house.gov/about/> (last visited Nov. 10, 2012).

78. Carl Hulse & Jim Rutenberg, *Bush Faces Resistance on Immigration*, N.Y. TIMES, May 17, 2006; *Lou Dobbs Tonight* (Fox television broadcast June 5, 2007).

79. M.E. Sprengelmeyer, *Debate on Immigration Bill in Congress pleases Tancredo After Years of Pushing the Issue: Littleton Republican has Ear of GOP Leadership*, DENV. ROCKY MTN. NEWS, Dec. 16, 2005 ("[O]n Thursday [during a House vote on Rep. Sensenbrenner's employment verification bill], [Tancredo] had a direct line to Republican leadership because without the support of his hard-line immigration caucus, it was unlikely they could pass anything to appease an increasingly vocal part of the Republican base.").

80. Jeff Zeleny, *THE 2008 CAMPAIGN: Rep. Tancredo of Colorado Enters G.O.P. Presidential Race*, N.Y. TIMES, Apr. 3, 2007 ("His intention is to force other Republican candidates, particularly Senator John McCain of Arizona, former Gov. Mitt Romney of Massachusetts and former Mayor Rudolph W. Giuliani of New York, to address illegal immigration.").

81. H.AMDT. 294, 110th Cong. (2007), amending H.R. 2638, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HZ294:>.

82. Beverly Wang, *Tancredo Targets N.H. "Sanctuary State" Bill*, DENV. POST, Sept. 5, 2007, http://www.thenewhampshireprimary.com/news/2007_09_05_news_nation1.html.

83. H.R. Res. 839, 109th Cong. (2006).

84. High Beam Research, *Lawmakers Introduce All-Encompassing National Security Begins at Home Illegal Immigration Reform Package*, US FED NEWS SERVICE, INCLUDING US STATE NEWS (Mar. 21, 2007), <http://www.highbeam.com/doc/1P3-1346939381.html>.

85. Luige del Puerto, *Tancredo Forms Group Opposing Pearce Recall*, ARIZ. CAPITOL TIMES, July 25, 2011, <http://azcapitoltimes.com/news/2011/07/25/tancredo-forms-group-oppos>

(2) While Tancredo is an example of an issue entrepreneur whose involvement tended to a greater focus on the national level, Kris Kobach is an individual whose dual involvement has generally favored the state and local levels. Kobach's first major involvement in immigration control was his authorship of the National Security Entry-Exit Registration System (NSEERS) in his role as chief advisor to Attorney General John Ashcroft on immigration and border enforcement.⁸⁶ However, most of his subsequent involvement on immigration has been at the state and local levels. As early as 2002, Kobach authored a memo while working at the Department of Justice that called for "allow[ing] local police officers to make arrests for civil violations of immigration law," a move that was initially opposed by the White House but subsequently adopted by the Office of Legal Counsel.⁸⁷ After moving to Kansas where he worked first as a law professor and then as Secretary of State, Kobach has served as legal counsel for many states and localities that have passed restrictive legislation, including the city of Hazleton, Pennsylvania, whose employer and landlord sanctions are pending Court review;⁸⁸ the city of Farmers Beach, Texas (*Villas at Parkside Partners v. City of Farmers Branch, Texas*)⁸⁹; and the city of Valley Park, Missouri (*Gray v. City of Valley Park, Missouri*).⁹⁰ Kobach is also providing legal counsel on constitutional challenges involving state legislation in Arizona and Alabama.⁹¹

ing-pearce-recall (stating Tancredo's Team America PAC, whose singular focus is on eliminating illegal immigration to the United States, set up a fundraising committee in 2011 to defend Russell Pearce, Arizona State Senator and chief architect of the state's SB1070 law); Gary Nelson, *Pearce Basks in Adulation at Rally*, ARIZ. REPUBLIC, Oct. 17, 2011, <http://www.azcentral.com/community/mesa/articles/2011/10/17/20111017russell-pearce-rally1019.html>.

86. Kris Kobach, *Resume*, http://www.kssos.org/forms/administration/Kobach_Bio_Resume.pdf.

87. Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, <http://www.nytimes.com/2002/04/29/us/administration-split-on-local-role-in-terror-fight.html> ("Critics are also upset that Mr. Ashcroft . . . has given . . . [Kobach] a leading role in developing the delicate policy even though Mr. Kobach, 36, is only a White House Fellow on temporary assignment to the Justice Department this year."). A 2002 Office of Legal Counsel Memorandum advances the position taken by Kobach.

88. Kent Jackson, *Top Court Gives City 2nd Chance*, STANDARD SPEAKER, June 7, 2011, <http://standardspeaker.com/news/top-court-gives-city-2nd-chance-1.1158117> (noting that Kobach, attorney for Hazleton, was encouraged by the Supreme Court's Whiting decision, arguing that it "put Hazleton on very strong ground" for remand consideration in front of the Third Circuit).

89. 577 F. Supp. 2d 858 (N.D. Tex. 2008).

90. 567 F.3d 976 (8th Cir. 2009).

91. *Counsel List - 567 U.S., Part 2*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/opinions/counsellists/counsellistsview.aspx?Filename=cl567-2.html>.

Perhaps more centrally to our model of issue entrepreneurship, Kobach has authored much of the subnational legislation wending its way through the courts, with each subsequent effort expanding the scope of subnational participation in immigration enforcement.⁹² Kobach's entrepreneurship is perhaps most evident in Alabama's HB56 in 2011. As reported in the Mobile Press-Register:

"Kobach got his introduction to Alabama politics in 2007, through a conference hosted in Birmingham by the Eagle Forum of Alabama, a conservative think tank. There, he met state Sen. Scott Beason, R-Gardendale, who said the two developed a relationship that centered on their shared concerns about the nation's immigration policy.

Beason, who carried the immigration bill in the Alabama Senate, said he leaned heavily on Kobach to help write it.⁹³

As Kobach's entrepreneurial work in Alabama reveals, state legislation on immigration is not a simple matter of homegrown solutions to persistent and thorny local problems, as legislators often portray the issue.⁹⁴ Instead, it often involves sponsorship and expertise from outside actors, who make critical choices on venues based on political opportunities (large Republican majorities in the legislature and a Republican governor), to build a case for the necessity and constitutionality of subfederal action. We will explain the strategic benefits of this particular method of policy proliferation in greater detail in Part III.B below.

Issue entrepreneurship is not merely the handiwork of a few individuals. Indeed, the most intensive and sustained involvement in this issue has been provided by the organizations Federation for American Immigration Reform (FAIR) and NumbersUSA. These organizations have devoted considerable resources, both to defeat moderate legislation at the national level and promote restriction at the subnational level.⁹⁵ They have large

92. See, for instance, the expanded scope of Alabama's HB56 in 2011, which passed one year after Arizona's SB1070. Alan Gomez, *States Make Daily Life Harder for Illegal Immigrants*, USA TODAY, Dec. 20, 2011, <http://usatoday.com/news/nation/story/2011-12-20/illegal-immigrants-contracts-void/52132602/1>.

93. George Talbot, *Kris Kobach, the Kansas Lawyer Behind Alabama's Immigration Law*, PRESS-REGISTER (Mobile, AL), Oct. 16, 2011, available at http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html.

94. Indeed it is likely that a homegrown effort would have avoided post-enactment handwringing, and a vow by the Alabama Governor to revisit and amend the legislation to cure several economic and social issues it has created for the state.

95. FAIR spent \$3.44 million on lobbying between 1998 and 2011. *Influence & Lobbying: Federation for Amer Immigration Reform*, OPENSECRETS.ORG, <http://www.opensecrets.org/lob>

national memberships and can mobilize public phone and email campaigns to national lawmakers that produce tangible results.⁹⁶ Importantly, these organizations bring a considerable measure of institutional investment and continuity that individuals like Tancredo and Kobach lack. Thus, while Tancredo's leadership on the issue declined after his departure from the U.S. Congress, and Kobach's centrality rose only after 2005, FAIR has been an enduring advocate for immigration restriction since 1979, and NumbersUSA has been doing so since 1997.⁹⁷ Both organizations have had their greatest impact after 2001.

(3) FAIR boasts a national membership of over 250,000 individuals and, since its founding, has advocated for sharp reductions in legal and illegal immigration, including "a temporary moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees."⁹⁸ In its first two decades, the organization focused its advocacy on legislation and enforcement at the national level, but it has also broadened its efforts with state lobbyists and regional field offices.⁹⁹ While the organization does not have local chapters, it works in partnership with other organizations, often providing legal and political expertise, as well as resources and personnel to local legislative campaigns.¹⁰⁰ Indeed, as the Los Angeles Times reported in 1994, FAIR's lobbyist in Sacramento, Alan Nelson, helped write the state's restrictive ballot measure, Proposition 187.¹⁰¹ By 2004, FAIR got much more directly involved in supporting state

by/clientsum.php?id=D000050827&year=2012. NumbersUSA spent \$3.47 million on lobbying between 2001 and 2011. *Influence & Lobbying: NumbersUSA.com*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientsum.php?id=D000054867&year=2012>.

96. Robert Pear, *Little-Known Group Claims a Win on Immigration*, N.Y. TIMES, July 15, 2007; Nicole Gaouette, *Immigration Bill Ignites A Grass-Roots Fire On The Right*, L.A. TIMES, June 24, 2007.

97. *About FAIR*, FAIRUS.ORG, <http://www.fairus.org/about> (last visited Nov. 10, 2012); *About NumbersUSA*, NUMBERSUSA.COM (last visited Nov. 10, 2012).

98. *Id.*

99. FAIR hired its current National Field Director in 2002 and supports local immigration reform groups in 33 states and the District of Columbia. Telephone Interview with FAIR staff member (Apr. 2012); *see also Join a Local Immigration Reform Group*, FAIRUS.ORG, <http://www.fairus.org/action/local-group> (last visited Nov. 10, 2012).

100. FAIR has provided testimony, reports, briefs, and issue letters to numerous state and local legislative bodies. *See FAIR's Testimony and Comments*, FAIRUS.ORG, <http://www.fairus.org/legislation/testimony> (last visited Nov. 10, 2012). One early example of assistance on state-level efforts was in litigation over Proposition 200 in Arizona in 2004. *See Proposition 200 Should be Implemented as the Voters Intended: Illegal Immigrants Must be Barred from Receiving All Nonemergency Benefits*, PR NEWswire, Nov. 19, 2004.

101. Paul Feldman, *Group's Funding of Immigration Measure Assailed*, L.A. TIMES, Sept. 10, 1994, http://articles.latimes.com/1994-09-10/local/me-36690_1_pioneer-fund ("When former federal immigration chief Nelson helped write the initiative last year, he was a

legislative efforts: it financially-backed Arizona's Proposition 200 campaign, a measure modeled after Proposition 187 that sought to deny unauthorized immigrants access to many public benefits;¹⁰² it subsequently filed a lawsuit in Arizona to make sure that the benefit provisions would be interpreted broadly.¹⁰³

Since 2004, FAIR has institutionalized its legal support of state and local ordinances through its legal affiliate, the Immigration Reform Law Institute (IRLI).¹⁰⁴ This group, with Michael Hethmon and Kris Kobach as lead advisors, offers legal counsel and model legislation to states and localities contemplating restrictive action and challenges state and local laws when they expand the rights of unauthorized immigrant residents in cases such as the California provision allowing in-state college tuition for unauthorized immigrants who graduate from the state's high schools¹⁰⁵ and San Francisco's issuance of municipal identification cards.¹⁰⁶

(4) Along with FAIR (and its legal arm, IRLI), NumbersUSA is the other major organizational force in immigration politics, fulfilling the vital role of derailing attempts at national, comprehensive immigration legislation through its work with specific legislators. The national organization was founded in 1997 by Roy Beck, advocate for immigration reduction and author of a best-selling book on the topic in 1996.¹⁰⁷ Critical to the group's founding was Dr. John Tanton, a one-time environmentalist turned

Sacramento lobbyist for the Federation for American Immigration Reform, a national organization that advocates sealing the nation's borders and reducing immigration." Note, however, that the ballot sponsors denied that the organization was directly involved.

102. Steven Wall, *Efforts Against Illegal Immigrants Rise*, SAN BERNARDINO SUN, Nov. 9, 2004.

103. At the trial court, *Yes on Proposition 200 v. Napolitano*, CV2004-092999 (Ariz. Sup. Ct. 2004), Plaintiff's claims were dismissed. However, on appeal the Arizona Court of Appeals reversed the dismissal of Plaintiff's declaratory judgment action against the Governor and allowed Plaintiffs leave to file second amended complaint. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 472 (Ariz. Ct. App. 2007); *see also Suit Filed Over AG's Opinion On Public Benefits Under Prop 200*, ARIZ. REPUBLIC, Nov. 19, 2004.

104. "The Immigration Reform Law Institute (IRLI) is FAIR's affiliated legal organization. . . . IRLI works extensively with state and local governments to design legislation that effectively addresses problems resulting from illegal immigration." *The Immigration Reform Law Institute*, FAIRUS.ORG, <http://www.fairus.org/Default.aspx?PageID=12564537>.

105. The Immigration Reform Law Institute appealed the case of *Martinez v. Regents of the University of California*, 241 P.3d 855 (2010), to the U.S. Supreme Court, where *certiorari* was denied, 131 S.Ct. 2961 (2011); *see also* Savage, *supra* note 60.

106. Coté, *supra* note 60.

107. *See* Roy Beck, *THE CASE AGAINST IMMIGRATION* (1996) (arguing that immigration adversely affects the U.S. labor market, the environment, and local community systems); *About Us: Early History*, NUMBERSUSA, <http://www.numbersusa.com/content/learn/about/roy-beck-executive-director.html>.

immigration crusader who spawned a number of prominent organizations like FAIR, NumbersUSA, and the Center for Immigration Studies.¹⁰⁸ Groups such as the Southern Poverty Law Center have long contended that Tanton's network is a multipronged effort at mobilizing racial antipathy towards Latinos,¹⁰⁹ and recently archived correspondence from Tanton at the University of Michigan indicate that he often invoked race and the threat of Mexican immigration to white racial dominance.¹¹⁰

As worries over Dr. Tanton's explicitly white nationalistic rhetoric grew,¹¹¹ Beck attempted to distance NumbersUSA from Tanton by 2002. However, reports show continued contact and relationship between NumbersUSA and other organizations directed by Tanton, and arms-length coordination on state legislative efforts between more mainstream groups and racial hate groups.¹¹² This ostensible distancing helps NumbersUSA serve its specific role in the entrepreneurial landscape. The organization provides the critical legitimating mechanism for the restrictionists in immigration discourse, channeling the racial and ethnic hostility of many of its supporters into race-neutral, policy positions palatable to national lawmakers.¹¹³

Although NumbersUSA had only 4,000 members in 2001,¹¹⁴ it swelled to nearly 500,000 members by mid-2007, as bipartisan comprehensive

108. Jason Deparle, *The Anti-Immigration Crusader*, N.Y. TIMES, Apr. 17, 2011, <http://www.nytimes.com/2011/04/17/us/17immig.html?pagewanted=all>.

109. *John Tanton is the Mastermind Behind the Organized Anti-Immigration Movement*, S. POVERTY LAW CTR. INTELLIGENCE REPORT: THE PUPPETEER, Vol. 106 (Summer 2002) ("The organized anti-immigration 'movement,' increasingly in bed with racist hate groups, is dominated by one man, John Tanton."); see also *INS and the Executive Office For Immigration Review: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 30–38 (2001) (statement of Roy Beck, Executive Director, NumbersUSA).

110. Deparle, *supra* note 108 ("‘One of my prime concerns,’ [John Tanton] wrote to a large donor, ‘is about the decline of folks who look like you and me.’ He warned a friend that ‘for European-American society and culture to persist requires a European-American majority, and a clear one at that.’”).

111. Pear, *supra* note 96.

112. Leonard Zeskind, *The New Nativism*, AMERICAN PROSPECT, Oct. 23, 2005, <http://prospect.org/article/new-nativism>.

113. Pear, *supra* note 96 (quoting Frank Sharry, executive director of the national Immigration Forum as stating “Roy Beck takes people who are upset about illegal immigration for different reasons, including hostility to Latino immigrants, and disciplines them so their message is based on policy rather than race-based arguments or xenophobia”).

114. Mallie Jane Kim, *After 9/11, Immigration Became About Homeland Security*, U.S. NEWS & WORLD REPORT, Sept. 8, 2011.

immigration reform efforts looked increasingly likely.¹¹⁵ Beck credited the growth in membership to a few primary factors, including the events of 9/11 and the immigration stance of President Bush.¹¹⁶ The organization works to stall moderate bipartisan efforts on immigration issues, even when those proposals comport with national majoritarian preferences.

Indeed, NumbersUSA's work was critical to derailing the 2007 comprehensive federal immigration bill, which had, at that point, received the support of President Bush, the U.S. Chamber of Commerce, the high-tech industry, the Catholic Church, immigrant-advocacy organizations, and several industries reliant on immigrant labor, including farming, food services, and construction.¹¹⁷ During the weeks leading up to the floor vote on the bill, NumbersUSA coordinated weekly phone calls with the Congressional Immigration Reform Caucus, mobilized its members to engage key senators, and provided those senators with the information and arguments necessary to oppose the bill.¹¹⁸ Several actors, including pro-immigrant advocates, restrictionists, and members of Congress, have credited NumbersUSA with causing the collapse of the bill in the Senate.¹¹⁹

(5) Finally, media actors have played a significant role in facilitating the work of issue entrepreneurs on immigration restriction at the national and subnational levels. Indeed, one media personality in particular, Lou Dobbs, played such a key role in both levels that he merits the designation as an issue entrepreneur. *Lou Dobbs Tonight* on CNN promoted the cause of immigration restriction in several ways: (1) providing sustained attention to national and subnational manifestations between 2003 and 2009, (2) raising the issue's salience among activists and non-activists alike, (3) providing a platform for restrictionists to express their views with little critical analysis or challenge, and (4) occasionally making fundraising appeals for the legal defense of subnational legislation.

Immigration was Dobbs' signature issue from the very founding of *Lou Dobbs Tonight* in June 2003. In the inaugural year of the show, Dobbs covered the topic of illegal immigration in 151 of 257 shows (59%).¹²⁰ During this time, he devoted about as much time to his other signature topic: outsourcing, an issue championed more by Democrats than

115. *Id.*; Krissah Williams, *Labor Groups, Business Seek Immigration Law Overhaul*, WASH. POST, Jan. 20, 2007.

116. Gaouette, *supra* note 96.

117. Pear, *supra* note 96.

118. *Id.*

119. Gaouette, *supra* note 96.

120. The show was dubbed *Lou Dobbs Tonight* starting on June 9, 2003. We treat the inaugural year as June 9, 2003 to June 8, 2004.

Republicans (160 shows).¹²¹ Since then, however, immigration reigned supreme in his program, as he covered the topic in 1,189 of 1,413 shows (84%), while the issue of outsourcing dipped to 565 (or 49%).¹²² Little surprise, then, that a Media Matters Report noted in 2008 that, “instead of *Lou Dobbs Tonight*, his program might be more properly called *Lou Dobbs Crusades Against Illegal Immigration Tonight*.”¹²³

His coverage of illegal immigration focused both on national legislation and personalities such as Jim Sensenbrenner, who introduced legislation in 2005 that would make illegal immigration and assisting illegal immigrants a felony, but also on local groups like the Minuteman Project, which recruited volunteers to patrol the U.S.–Mexico border.¹²⁴ Dobbs also provided a national platform for Hazleton, Pennsylvania and its then-mayor Lou Barletta, including devoting an entire show to a town hall meeting on immigration hosted by the city.¹²⁵

Dobbs also often took on the role of an advocate, even going so far as making fundraising appeals for the city’s attempts to defend itself against legal challenges by the ACLU and MALDEF.¹²⁶ The extent of Dobbs’ advocacy on subnational policy was perhaps most evident in the case of Governor Eliot Spitzer’s decision to make driver licenses available to unauthorized immigrants in New York in 2007.¹²⁷ He devoted over thirty shows to the topic, criticizing Spitzer’s proposal, inviting his guests to do the same, and mobilizing public opposition.¹²⁸ The level of mobilization was

121. *Lou Dobbs Tonight Transcripts*, CNN.COM, <http://transcripts.cnn.com/TRANSCRIPTS/ldt.html> (last visited Nov. 10, 2012).

122. *Id.*

123. Paul Waldman et al., *Fear & Loathing in Prime Time: Immigration Myths and Cable News*, MEDIA MATTERS (May 21, 2008), http://mediamattersaction.org/reports/fearandloathing/online_version.

124. From 2004 to 2006, Sensenbrenner was covered in 119 shows, and the Minutemen were covered in 129 shows.

125. *Lou Dobbs Tonight* (Fox television broadcast May 2, 2007), available at <http://transcripts.cnn.com/TRANSCRIPTS/0705/02/ldt.02.html>.

126. *Lou Dobbs Tonight*, (Fox television broadcast May 4, 2007), available at <http://transcripts.cnn.com/TRANSCRIPTS/0705/04/ldt.01.html> (urging viewers to donate funds to subsidize Hazleton’s legal defense of its immigration ordinance).

127. Nicholas Confessore, *Lou Dobbs Crusades Against Spitzer’s Driver’s License Plan for Illegal Immigrants*, N.Y. TIMES, Oct. 17, 2007, <http://www.nytimes.com/2007/10/17/nyregion/17dobbs.html>.

128. Dobbs called the proposal “outrageous” on his October 29th, 2007 show. Press Release, N.Y. State Senator John J. Flanagan, Senator Flanagan Appears on CNN’s Lou Dobbs Tonight to Discuss Spitzer’s Licensing Policy (Oct. 29, 2007), available at <http://www.nysenate.gov/news/senator-flanagan-appears-cnn-s-lou-dobbs-tonight-discuss-spitzer-s-licensing-policy> (includes a transcript of the show).

intense and sustained and was largely credited in forcing Spitzer to drop his proposal, who declared, “It does not take a stethoscope to hear the pulse of New Yorkers on this topic.”¹²⁹

2. Issue Entrepreneurs in Context

These issue entrepreneurs are notable in our Polarized Change model for the multifarious work that they have done: they have engaged in both federal and subfederal levels, sharpening prior conditions of party polarization and shaping the rise of ethnic nationalism—all to advance a restrictionist agenda that has depended both on preventing bipartisan, moderate legislation at the national level and proliferating restrictive legislation at the subnational level. Here, we provide illustrations of this process from each of the last three presidential terms.

Bush First Term (2001 to 2004): The scholarship on partisanship has noted a marked increase in polarization since 2000, after a protracted and contentious debate over the legitimacy of the Presidential election and sharp disagreements over tax cuts in 2001 and the prosecution of the Iraq war in 2003.¹³⁰ Despite the general rise in party polarization, it was not inevitable that legislative attempts on immigration policy since 2000 would divide sharply along party lines and fail to pass the U.S. Congress. Indeed, Bush was able to centralize in several areas of domestic policy that his own party had, for many years, left to states.¹³¹ For instance, the No Child Left Behind Act passed by overwhelming majorities in the House and Senate in 2001,¹³² and even contentious measures such as the 2001 tax cuts and the 2002 Iraq

129. Erika Hayasaki, *Driver's License Plan Dropped*, L.A. TIMES, Nov. 15, 2007, <http://articles.latimes.com/2007/nov/15/nation/na-spitzer15>.

130. GARY C. JACOBSON, *A DIVIDER, NOT A UNITER: GEORGE W. BUSH AND THE AMERICAN PEOPLE: THE 2006 ELECTION AND BEYOND* 1–3 (2009); Alan I. Abramowitz & Walter J. Stone, *The Bush Effect: Polarization, Turnout, and Activism in the 2004 Presidential Election*, 36 PRESIDENTIAL STUD. Q. 141 (2006); Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563 (2008); Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83 (2006).

131. Dale Krane, *The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency*, 37 PUBLIUS (ISSUE 3), 453, 453–54 (2007).

132. No Child Left Behind Act of 2001, H.R. 1, 107th Cong. (2001) (enacted) (passed in the House 384–45 and Senate 91–8); see *Bill Overview*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h107-1> (summary of congressional voting for No Child Left Behind Act of 2001).

War Resolution managed to draw enough bipartisan support to reach the President.¹³³

In the immigration context specifically, prior votes on landmark legislation also garnered sufficient bipartisan support to pass: the 1986 Immigration Reform and Control Act won nearly 43% of Republican support in the U.S. House in addition to 65% of Democrat support in the chamber.¹³⁴ Similarly, in 1996, 94% of Democrats joined 100% of Republicans in the U.S. Senate in favor of the Illegal Immigration Reform and Immigrant Responsibility Act.¹³⁵

With the strong backing of President Bush and Senators such as Sam Brownback (R-KS) and Ted Kennedy (D-MA), it seemed that immigration reform might once again pass the U.S. Congress after 2000.¹³⁶ Immigration reform was high on the Bush administration's legislative agenda in the summer of 2001.¹³⁷ Having passed a contentious and ambitious ten-year tax reduction plan, the administration was gearing up to work on a way to regularize the flow of migrants from Mexico and provide a path to legalization for those already residing in the United States.¹³⁸ The administration was especially eager to show progress on this issue in advance of the State visit of President Vicente Fox, a personal friend of the

133. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002) (enacted) (passed in the House 296–133 and Senate 77–23); Economic Growth and Tax Relief Reconciliation Act of 2001, H.R. 1836, 107th Cong. (2001) (enacted) (passed in the House 230–197 and Senate 62–38); see *Resolution Overview*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=hj107-114> (summary of congressional voting for Authorization for Use of Military Force Against Iraq Resolution of 2002); *Bill Overview*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h107-1836> (summary of congressional voting for Economic Growth and Tax Relief Reconciliation Act of 2001).

134. See *House Vote #872 in 1986*, GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=h1986-872> (last visited Oct. 23, 2012).

135. See *Senate Vote #108 in 1996*, GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=s1996-108> (last visited Oct. 23, 2012).

136. See Marc Cooper, *High Noon on the Border*, THE NATION, June 6, 2005, available at <http://www.thenation.com/article/high-noon-border>; Kristen Lombardi, *Out in the Cold*, BOSTON PHOENIX, Aug. 15–22, 2002, available at http://www.bostonphoenix.com/boston/news_features/other_stories/multipage/documents/02425201.htm.

137. See Cooper, *supra* note 136.

138. Bob Kemper, *U.S.-Mexico Immigration Plan Delayed*, CHI. TRIB. (Sept. 1, 2001), available at http://articles.chicagotribune.com/2001-09-01/news/0109010148_1_bush-and-fox-president-bush-first-state-dinner; Eric Schmitt, *Bush Aides Weigh Legalizing Status of Mexicans in U.S.*, N.Y. TIMES (July 15, 2001), available at <http://www.nytimes.com/2001/07/15/us/bush-aides-weigh-legalizing-status-of-mexicans-in-us.html?pagewanted=all&src=pm>.

President, in early September.¹³⁹ Even though the September 11 attacks delayed any attempt at comprehensive immigration reform, a bipartisan group of legislators still tried to pass smaller measures.

One such attempt was in 2002, as legislative leaders in Congress tried to amend a seemingly obscure provision extending the grandfather period during which eligible undocumented immigrants could apply for legal permanent residency without leaving the United States.¹⁴⁰ Tancredo mounted a vigorous opposition, claiming that the bill would “invite future terrorists to exploit lax enforcement of the immigration laws.”¹⁴¹ He succeeded in pushing for a two-thirds supermajority rule on the legislation; FAIR lobbied wavering legislators, and NumbersUSA mobilized its grass-roots supporters to maximize Republican opposition to the measure in Congress.¹⁴² The resistance emboldened opposition in the U.S. Senate where it subsequently stalled.¹⁴³ Thus, even though the amendment had the backing of the Bush administration, the insurgent activities of issue entrepreneurs derailed bipartisan attempts to allow for limited adjustment of status by pushing many moderate Republicans into the restrictionist camp.¹⁴⁴

139. Eric Schmitt, *Two Amigos Visit Toledo and Court its Mexicans*, N.Y. TIMES, Sept. 7, 2001, <https://www.nytimes.com/2001/09/07/world/two-amigos-visit-toledo-and-court-its-mexicans.html?src=pm>.

140. Enhanced Border Security and Visa Entry Reform Act of 2002, H. Res. 365, 107th Cong. (2001), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:H.RES.365>: (proposing changes to 8 U.S.C. § 1255(i), regarding Adjustment of Status).

141. Section 245(i) of the Immigration and Nationality Act passed in 1994, and was renewed in 1997 and 2000. The Bush administration pushed vigorously for the measure with the hope of having a signed bill prior to the President’s visit to Mexico in March 2002. The Democrats hoped to make the extension permanent. However, Congressman Tancredo used various legislative maneuvers to force a two-thirds requirement that passed with one vote. See Robert Pear, *House Passes Immigrant Bill To Aid Mexico*, N.Y. TIMES, Mar. 13, 2002.

142. DeParle, *supra* note 108 (“Numbers USA showed its force in 2002 when Republican leaders of the House backed a bill that would have allowed some illegal immigrants to remain in the United States while seeking legal status. Numbers USA set the phones on fire, and a majority of Republicans opposed it. ‘I had people come up to me on the floor of the House saying, ‘O.K., O.K., call off the dogs’—meaning Numbers USA,’ said former Representative Tom Tancredo, a Colorado Republican who fought the bill.”).

143. See Enhanced Border Security and Visa Entry Reform Act of 2002, H.R. 365, 107th Cong. (2001), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:H.RES.365>; ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i) (2003), available at <http://congressionalresearch.com/RL31373/document.php?study=Immigration+Adjustment+to+Permanent+Resident+Status+Under+Section+245i>.

144. M.E. Sprengelmeyer, *Debate on Immigration Bill in Congress Pleases Tancredo After Years of Pushing the Issue: Littleton Republican has Ear of GOP Leadership*, ROCKY MOUNTAIN NEWS (Denver), Dec. 16, 2005, <http://m.rockymountainnews.com/news/>

Accordingly, our theory emphasizes that national legislative gridlock on immigration matters is specifically influenced by party polarization, not just heterogeneity and interest diffusion as it may be in other regulatory areas.¹⁴⁵ Undoubtedly, such heterogeneity and diffusion exists in immigration law as well; those clamoring for federal immigration laws are sometimes a strange amalgam of interests, from immigrants' advocacy groups to private business interests, who either need a labor source or are trying to avoid state-by-state regulations.¹⁴⁶ And, the platform for national legislation is broad, ranging from providing pathways to legalization to creating uniform employment regulations to reconsidering admissions limitations and enforcement priorities.¹⁴⁷

These disparate groups have demonstrated the capacity to coalesce over the past decade to advance federal immigration reforms.¹⁴⁸ Many of these proposals enjoyed the support of national majorities and bipartisan

2005/dec/16/debate-on-immigration-bill-in-congress-pleases/ (noting the necessity of GOP leadership taking heed of hard-line restrictionists because of the voting power of Tancredo's immigration caucus).

145. See, e.g., Hills, *supra* note 56, at 12 ("The problem [of creating national gridlock] is not that interest groups do not represent diffuse ideological interests. Rather, the problem is that nothing unifies these interests into coalitions capable of making policy."). To be clear, Hills expressly excluded immigration from his consideration, focusing instead on other regulatory areas. *Id.* at 8. Our comments are orthogonal to his—not oppositional. We use this opportunity to showcase how some of the important considerations and theories one might defend with regards to federal legislative generally, may not neatly apply in the immigration context.

146. See Victoria DeFrancesco Soto, *Strange Bedfellows in Arizona's Recall of Russell Pearce*, DAILY GRITO, July 21, 2011, <http://drvmids.com/2011/07/strange-bedfellows-in-arizona%E2%80%99s-recall-of-russell-pearce/> (discussing coalition of Chamber of Commerce, the Church of Jesus Christ of Latter-day Saints and Latinos in opposition to SB 1070 and supporting recall of State Senator Russell Pearce).

147. See, e.g., 2012 Democratic Platform, available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (last accessed Sept. 14, 2012) (lauding President Obama for securing the Mexican-American Border, streamlining the process of immigration for relatives of citizens, for the Deferred Action for Childhood Arrivals program, and enhancing immigrant integration); 2012 Republican Platform, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (last accessed Sept. 14, 2012) (promoting the granting of visas to highly-skilled immigrants, state-control in voter ID laws and immigration, the mandatory use of e-verify, immigrant participation in the Armed Forces, and opposing amnesty for illegal immigrants).

148. See Antiterrorism and Effective Death Penalty Act of 1996, S. 735, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN00735:@@R>; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03734:@@R>; Ankush Agarwal, Comment, *Obstructing Justice: The Rise and Fall of the AEDPA*, 41 SAN DIEGO L. REV. 839, 850 (2004); Daniel J. Tichenor, *Strange Bedfellows: The Politics and Pathologies of Immigration Reform*, 5 LAB. 39, 60 (2008).

congressional support.¹⁴⁹ So, despite the frailties described above, pro-immigrant (or anti-regulation/enforcement) forces are capable of joining together for sufficient periods of time to place legislation on the national agenda, and force floor debates and votes. Yet, because it is much easier to defeat federal legislation than to shepherd it to passage,¹⁵⁰ focused minority interests represented by restrictionist issue entrepreneurs have been able to defeat those clamoring for national immigration legislation.¹⁵¹ National proposals moderate and compromise the restrictionist agenda in significant ways, and the federal legislature provides far less opportunities for envelope-pushing, productive entrepreneurial activity than do subfederal forums.¹⁵²

Thus, the Polarized Change model helps explain why, in the immigration field, congressional gridlock may be even more difficult to overcome than in other regulatory areas.¹⁵³ While subject to some of the same concerns about heterogeneity of interests and the difficulty of maintaining coalitions, it also features activists and insiders, like Tancredo, capable of polarizing immigration politics and stagnating federal reform, even when majority interests coalesce.

In addition to exacerbating party polarization, issue entrepreneurs also took advantage of the rhetorical opportunities offered by the September 11 attacks, which birthed a new form of ethnic nationalism. The post-9/11 version of ethnic nationalism championed by issue entrepreneurs moved beyond the “culture threat” concerns articulated famously in 1991 by conservative commentator and then-Republican presidential candidate Pat Buchanan.¹⁵⁴ Although the fear of cultural balkanization was still prominent

149. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, S. 735, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN00735:@@@R>; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03734:@@@R>.

150. Hills, *supra* note 56, at 12–13 (citing KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 20–48 (1998) (“[B]ecause enacting federal laws requires supermajorities to overcome presidential vetoes or senatorial filibusters, a group of interests far smaller than a majority can block legislation.”)).

151. Deparle, *supra* note 108; Shannon Oxley, *Federation for American Immigration Reform*, ENCYCLOPEDIA OF IMMIGRATION (Nov. 28, 2011), <http://immigration-online.org/492-federation-for-american-immigration-reform.html>.

152. Hills, *supra* note 56, at 21 (“[I]ncumbent members of Congress may also regard political entrepreneurship as too risky, given the specialized communities that it might offend and the benefits of . . . cultivating the personal vote.”).

153. *Id.* Note that Professor Hills specifically writes outside the context of immigration law, so our suggestions do not necessarily contradict his.

154. Clarence Page, *And, Now, The Pat And David Show*, CHI. TRIB., Dec. 11, 1991 (“[I]f we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in

among immigration restrictionists after 9/11,¹⁵⁵ the attacks introduced a new dimension of national security to the public discourse on immigration restriction.

With national security considerations adding a level of legitimacy and plausible deniability to the role of racial antipathy in nativist sentiment, issue entrepreneurs made sure to invoke this dimension frequently in their opposition to immigration. They frequently lumped illegal immigrants together with terrorists in discussions ranging from the U.S.–Mexico border crossing¹⁵⁶ to the attempt by states to grant drivers licenses to unauthorized immigrants.¹⁵⁷ Indeed, as Professor Jennifer Chacon has noted, the term “border security” emerged only after 9/11, as prior discussions of “border control” took on military metaphors and subsumed concerns about homeland security and terrorism.¹⁵⁸ The conflation of terrorism and illegal immigration, in turn, had a chilling effect on legislative attempts at the national or subnational levels that were perceived as being “soft” on illegal immigrants. As James Carafano, a homeland security expert at the conservative Heritage Foundation noted: “the connection between immigration and terrorism in policy discussions did make it more difficult to have a rational debate with some people, who could just throw in terrorism and halt the conversation.”¹⁵⁹

Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?”).

155. See Samuel Huntington, *The Hispanic Challenge*, FOREIGN POLICY, Mar./Apr. 2004, 30 (“The persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures, and two languages.”).

156. See J.D. HAYWORTH WITH JOSEPH J. EULE, *WHATEVER IT TAKES: ILLEGAL IMMIGRATION, BORDER SECURITY, AND THE WAR ON TERROR* (2006). [BB R 15]

157. CNN’s *Lou Dobbs Tonight* frequently made the linkages between state drivers licenses to illegal immigrants and terrorist threats to homeland security. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast Oct 17, 2007), <http://transcripts.cnn.com/TRANSCRIPTS/0710/17/ldt.01.html> (“The governor . . . will make it easier for law breakers of all sorts—including terrorists—to take advantage of New York State’s driver’s license . . .”).

158. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1853 (2007) (“[R]emovals of noncitizens . . . can be, and frequently are, depicted as national security policy. With regard to border enforcement efforts, the phrase ‘border security’ has become a ubiquitous descriptive term . . .”).

159. Mallie Jane Kim, *After 9/11, Immigration Became About Homeland Security*, U.S. NEWS & WORLD REP., Sept. 27, 2011, <http://www.usnews.com/news/articles/2011/09/08/after-911-immigration-became-about-homeland-security-attacks-shifted-the-conversation-heavily-toward-terrorism-and-enforcement>; cf. Linda Bosniak, *‘Nativism’ the Concept: Some Reflections*, in IMMIGRANTS OUT! 279 (Juan Perea ed., 1996) (arguing that the word “nativism” is not as important for what it means as what it does; that is, it delegitimizes points of view and takes them out of the bounds of rational debate).

This invocation of security tropes, combined with an almost exclusive focus on unwanted migration from the southern border, situates the proliferation of subnational immigration regulation within the historical narrative of the past decade, showing how 9/11 changed the discourse of immigration, providing issue entrepreneurs with the necessary language to covertly indulge the racial and cultural prejudices of a portion of the citizenry. Further, it showcases the precise mechanism by which nebulous racial and cultural concerns can be exploited within political factions to produce immigration policy.

Scholars like Michael Wishnie have long maintained that devolved immigration decision-making will lead to increased bigotry.¹⁶⁰ Recent findings by the Department of Justice regarding local immigration enforcement in Arizona support his contention.¹⁶¹ Racial profiling and disparate enforcement seem to inevitably *result* when states and localities attempt to enforce immigration (although, one might worry about the racial disparity in immigration enforcement generally, regardless of whether federal or subfederal entities engage in it¹⁶²). Missing from these important explorations of the effects of subnational immigration regulation is an account of how ethnic nationalism and racial prejudice work to *produce* state and local regulation in the first instance.

To fill that void, the Polarized Change model shows how restrictionist issue entrepreneurs effectively take advantage of latent racial prejudice to build party and local majority support for immigration legislation. Through the prism of national security and homeland sanctity, entrepreneurs have successfully moved explicit racial and cultural reasons for restriction from the fringe of political discussion to the mainstream. The racialized component of homeland security discourse is evidenced by the focus on

160. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 553 (2001) (arguing that devolution of immigrant-related lawmaking power to the states would “erode the antidiscrimination and anticaste principles that are at the heart of our Constitution”).

161. Letter Memorandum from Thomas E. Perez, Assistant U.S. Attorney Gen., to Mr. Bill Montgomery, Cnty. Attorney for Maricopa Cnty., Ariz. (Dec. 15, 2011) (discussing the United States’ Investigation of the Maricopa County Sheriff’s Office: “[b]ased upon our extensive investigation, we find reasonable cause to believe that [the sheriff’s office] engages in a pattern or practice of unconstitutional policing. Specifically, we find that [the sheriff’s office] . . . engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos”).

162. Federal law maintained racial barriers to naturalization, excluded based on national and racial origin, and recently called for special registration of certain middle-eastern migrants through its NSEERS program—a program architected, in part, by Kris Kobach, one of the immigration issue entrepreneurs we identify, during his stint with the Department of Justice. *See generally* Huntington, *supra* note 9.

Mexican migrants and the southern border and the use of explicitly racialized rhetoric to drum up support for restrictionist policies. In sum, the Polarized Change model incorporates and explains the role of ethnic nationalism and racial prejudice in the genesis—and not just the result—of subnational immigration law.

Finally, from 2001 through 2004, issue entrepreneurs were working at both federal and subfederal levels. Even before state legislative efforts at immigration restriction were making national headlines in 2006, groups such as FAIR were getting involved in subnational efforts to restrict immigration. For example, during the summer of 2001, the organization played a supportive role in advising local activists in Iowa who were mobilizing against Governor Tom Vilsack's Model Cities program to create "immigration enterprise zones" to address the state's chronic labor shortages.¹⁶³ Also, as we noted in the prior section, FAIR gathered signatures for Arizona's restrictionist Proposition 200 in 2004 and filed lawsuits after the measure's passage to ensure its broadest application.¹⁶⁴

Bush Second Term (2005 to 2008): Soon after the 2004 election, the Bush administration again made comprehensive immigration reform a policy priority, encouraging renewed efforts at bipartisan legislation.¹⁶⁵ At the same time, the President's standing within the Republican Party was diminished considerably. Not only was Bush a lame-duck party leader whose Vice-President had forsworn any plans to run in 2008, he also lost considerable standing among conservative activists who were frustrated with the administration's failure to rein in government spending¹⁶⁶ and its inability to privatize aspects of Social Security in early 2005.¹⁶⁷

163. William Claiborne, *Immigration Foes Find Platform in Iowa; National Groups Fight Governor on Recruiting Workers From Abroad*, WASH. POST, Aug. 19, 2001, <http://www.washingtonpost.com/wp-dyn/articles/A28131-2001Aug18.html>.

164. See, e.g., Yes on Proposition 200 v. Napolitano, 215 Ariz. 458 (Ariz. Ct. App. 2007).

165. RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS (2006); Hugh Dellios, *Immigration Tops Summit Agenda*, CHI. TRIB., Mar. 30, 2006, http://articles.chicagotribune.com/2006-03-30/news/0603300239_1_illegal-immigration-immigration-reform-bush-and-fox.

166. The increase in spending under the 2003 Medicare Prescription Drug Modernization Act was particularly galling to many conservative leaders and activists in the Republican Party. Craig Shirley & Donald Devine, *Karl Rove Is No Conservative, as His Memoir Shows*, WASH. POST, Apr. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033102630.html>.

167. Rachel Morris, *Borderline Catastrophe: How the Fight Over Immigration Blew up Rove's Big Tent*, WASH. MONTHLY, Oct. 2006, <http://www.washingtonmonthly.com/features/2006/0610.morris.html>.

Thus, issue entrepreneurs such as Tom Tancredo (R-CO) and NumbersUSA found it much easier to mobilize Republican Party activists and elected officials towards a more restrictive position. Making effective use of conservative talk radio and constituent pressure, they thinned the ranks of Republican moderates on immigration, making the parties more polarized on the issue than they would have been otherwise.¹⁶⁸ This was perhaps most evident in the case of Jim Sensenbrenner's (R-WI), who spearheaded an enforcement-only measure in 2005, although he previously supported legislation such as the § 245(i) provision Tancredo opposed in 2001 and 2002.¹⁶⁹

The exacerbation of party polarization by issue entrepreneurs continued through 2007, when Comprehensive Immigration Reform legislation had majority support in both chambers of Congress, but failed to overcome the Senate filibuster, as restrictionist organizations put enormous pressure on moderate Republicans to prevent cloture. As the New York Times reported:

The big war broke out in 2007, after Mr. Bush proposed a systemic overhaul including a path to citizenship for most illegal immigrants

FAIR rallied talk show hosts. The Center for Immigration Studies churned out studies of the bill's perceived flaws. Numbers USA jammed the Capitol's phones.

Their success became the stuff of lore. They "lit up the switchboard for weeks," said Senator Mitch McConnell of Kentucky, the Republican leader, explaining his decision to oppose the bill. "And to every one of them, I say today: 'Your voice was heard.'"¹⁷⁰

This covert and overt multilevel work in derailing federal immigration law has largely gone unexamined because restrictionist issue entrepreneurs do not concurrently advance an alternate comprehensive, legislative

168. Interview with Angela Kelley, Former Deputy Dir. of the Nat'l Immigration Forum (Feb. 2011) (notes on file with author).

169. Press Release, F. James Sensenbrenner, Jr., Chairman, H.R. Comm. on the Judiciary, Rep. Gekas Introduces Compromise Immigration 245(i) Extension Legislation; Sensenbrenner Supports Expedited House Consideration Next Week (May 17, 2001) (Sensenbrenner called 245(i) a "fair piece of compromise legislation that deserves passage. I believe this legislation strengthens families without unintentionally encouraging people to break the law").

170. Deparle, *supra* note 108.

solution.¹⁷¹ Indeed, groups such as FAIR consider “comprehensive immigration reform” simply a code for amnesty and see maximal enforcement as the only acceptable solution.¹⁷² Thus, restrictionist issue entrepreneurs are focused mainly on forestalling bipartisan Congressional action that would moderate hard-line restrictionist goals. Relatedly, they do not attract the attention that a special interest group garners when it seeks concentrated fiscal gains or private benefits.¹⁷³ Because they work at multiple levels, they can utilize congressional delay to build subnational momentum towards a more restrictionist national stance.¹⁷⁴ Moreover, issue entrepreneurs have been successful in securing federal concessions through quieter avenues than congressional legislation.¹⁷⁵ Thus, even in the absence of federal legislative solutions that could preempt their subfederal policies and increase public scrutiny, issue entrepreneurs have been able to secure favorable federal action in an enforcement-only direction.

Under these background conditions, restrictionist issue entrepreneurs instead (a) engender federal legislative gridlock, (b) squeeze substantial political mileage out of complaining about that specific type of federal inaction, and then (c) fill that legislative vacuum by proliferating subfederal immigration laws that feature uncompromised versions of their restrictionist agenda. The Supreme Court, in *Chy Lung v. Freeman*,¹⁷⁶ gestured that

171. We note, however, that there have been some federal legislative efforts championed by issue entrepreneurs. Some, like the Secure Fences Act of 2006, were successful. Others, like the CLEAR Act were not.

172. Federation for American Immigration Reform, *The Push for Amnesty for Illegal Aliens* (2010), available at <http://www.fairus.org/issue/the-push-for-amnesty-for-illegal-aliens>. (“[O]f the three legs of the stool [enforcement, improved legal flows, path to legalization], only one leg — law enforcement — makes sense and has broad public support.”).

173. See Hills, *supra* note 56, at 10–11 (citing Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990) (describing holdups to federal legislation, including “Madison’s Nightmare” of majority inaction enabling minority dominance and problems of collective action)).

174. See Press Release, Mitt Romney, Mitt Romney Announces Support of Kansas Secretary of State Kris Kobach (Jan. 11, 2012), <http://www.presidency.ucsb.edu/ws/index.php?pid=99028>. In its current and recent versions, comprehensive federal immigration reform proposals feature items anathema to the restrictionist vision, like the DREAM Act and increased legal immigration. Federation for American Immigration Reform, *FAIR Applauds Senate Defeat of the “Recurring” DREAM Act Amnesty*, PRNEWswire (Oct. 24, 2007), <http://www.prnewswire.com/news-releases/fair-applauds-senate-defeat-of-the-recurring-dream-act-amnesty-58904982.html>.

175. See *supra* Part II.B.2 (describing Obama Administration’s enforcement heavy concessions).

176. 92 U.S. 275 (1875).

federal inaction builds the necessary constitutional narrative¹⁷⁷ for subfederal involvement in immigration. Issue entrepreneurs limit the idea of “federal inaction” to recent congressional inaction,¹⁷⁸ and they use this frame to instantiate their policy goals at the local and state levels and build momentum towards a new legal and political norm for immigration enforcement.

With respect to ethnic nationalism, issue entrepreneurs such as Lou Dobbs tried different ways to cast Latin American immigrants as a security threat.¹⁷⁹ With concerns over terrorist threats becoming less salient over time, and economic anxiety not yet on the horizon, aspects of immigrant criminality suddenly seemed very salient. Thus, for instance, elected representatives such as Lou Barletta from Hazleton and Russell Pearce from Arizona justified their restrictionist efforts by claiming a rise in violent crime among Mexican immigrant residents and the possibility of clandestine cross-border arms networks.¹⁸⁰ Law enforcement officials such as Arizona Sheriff Joe Arpaio affirmed such claims.¹⁸¹ Finally, media personalities such as Lou Dobbs amplified the anxiety by running stories on immigrants and crime, suggesting that gangs of illegal immigrants from Latin America were prompting a rash of new crimes in the country.¹⁸²

These claims mostly did not stand up to empirical scrutiny: while the isolated stories about particular crimes involving Latin American immigrants were not false, the idea of widespread immigrant criminality was belied by evidence. In fact, scholarly study indicated the contrary;

177. *Id.* at 280 (“We are not called upon by this statute to decide for or against the right of a State in the absence of legislation by Congress, to protect herself by . . . laws against paupers and convicted criminals from abroad”); Huntington, *supra* note 9, at 821 (noting the significance of this language from *Chy Lung*, specifically its seeming invitation to state immigration regulation in times of federal inaction).

178. We explain the marginalizing of the role of the federal executive defining federal policy below. *See infra* Part III.B.1.

179. *See* Waldman et al., *supra* note 123.

180. Mariano Castillo, *Crime Stats Test Rationale Behind Arizona Immigration Law*, CNN, Apr. 29, 2010, http://articles.cnn.com/2010-04-29/justice/arizona.immigration.crime_1_sen-russell-pearce-illegal-immigration-immigration-law?_s=PM:CRIME; Janet Klein, *Welcome to Hazleton*, CBS News (Apr. 28, 2010), http://www.cbsnews.com/2100-18560_162-2195789.html.

181. Andrea Nill Sanchez, *Sheriff Joe Arpaio: We Should Send Troops to Mexico*, THINK PROGRESS (Mar. 16, 2010), <http://thinkprogress.org/security/2010/03/16/175949/arpaio-troops-mexico/> (referring to Arpaio’s appearance on MSNBC News Live on March 16, 2010 where he noted that the U.S. government should “send the troops into Mexico” to address violence due to illegal immigration).

182. *See, e.g., Lou Dobbs Tonight* (Fox Business Network October 5, 2006).

immigrants committed fewer crimes than native-borns¹⁸³ and immigrant-heavy cities like Houston and states like Arizona were actually facing significant declines in violent crime.¹⁸⁴

As Professor Carpenter argues, legislative epidemics are most likely when the entrepreneurs' message is especially sticky.¹⁸⁵ Undoubtedly, the trope of immigrant criminality is not new to issue entrepreneurs or this last decade of immigration discourse. The message of immigrant and foreign threat to domestic prosperity, security, and cultural values is a long-held and deeply-ingrained trope in American political and legal history.¹⁸⁶ It is so entrenched in the American political imagination that it resists empirical refutation.¹⁸⁷ Despite data from economists and sociologists showcasing national welfare gains from more liberal migration laws¹⁸⁸ and the lack of

183. Eyal Press, *Do Immigrants Make Us Safer?*, N.Y. TIMES (Magazine), Dec. 3, 2006; Ruben G. Rumbaut et al., *Debunking the The Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (June 2006). Crime data by nativity or race is not available for the vast majority of (small) municipalities and counties in the United States, and thus cannot be incorporated into our analysis of local ordinances in Part I.

184. Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 19, 2010 ("[T]he rate of violent crime at the border, and indeed across Arizona, has been declining, according to the Federal Bureau of Investigation.").

185. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 21–25 (2010) (describing the use of sticky messages to successfully "market" criminal legislation).

186. See, e.g., Kitty Calavita, *The New Politics of Immigration: "Balanced-Budget Conservatism" and the Symbolism of Proposition 187*, 43 SOC. PROBS. 284 (1996); Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009) (arguing that anti-immigrant regulations impossibly and impermissibly attempt to protect perceived cultural values and commonalities); *Criminal Aliens*, FED'N FOR AM. IMMIGRATION REFORM, <http://www.fairus.org/issue/criminal-aliens>; Ruben G. Rumbaut et al., *Debunking the The Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (June 2006), available at <http://www.migrationinformation.org/Feature/display.cfm?id=403>.

187. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1710 (2011) ("Although other studies have found that illegal immigration significantly benefits state budgets Roughly three-quarters of Americans believe unauthorized immigrants harm the economy . . .").

188. See Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23 (2008); Tamar Jacoby, *Immigration Nation*, FOREIGN AFFAIRS, Nov./Dec. 2006, <http://www.foreignaffairs.com/articles/62090/tamar-jacoby/immigration-nation>. Note that we acknowledge findings that suggest some short-term economic losses concentrated at the local level (from medical care and other local public services). However, even accounting for those potential losses, evidence overwhelmingly shows the net welfare gains from more increased immigration. Further, the objection of concentrated local losses could always be addressed through cross-subsidization schemes whereby federal windfalls could be distributed to specifically affected municipalities.

correlation between immigration and crime,¹⁸⁹ public perception about the negative impact of increased migration remains largely unchanged.¹⁹⁰

What is innovative about issue entrepreneurs in this specific time period, however, are the connections they drew between the purported immigrant criminality, homeland security, and subnational immigration policy. They successfully blamed so-called sanctuary cities for facilitating and sheltering dangerous immigrant criminals and illegal immigrant gangs.¹⁹¹ Conversely, if certain cities' lenient policies were in part responsible for the flourishing of immigrant criminal activity, then the corollary must be true: states and cities could and should be part of the solution, thereby justifying local police participation in immigration enforcement. Protecting domestic security in a post-9/11 world, then, was not just about national border control; it also required the elimination of sanctuary cities and the increased participation of states and cities in criminalizing illegal immigration and enforcing immigration law.

Enter Kris Kobach. While entrepreneurs, media personalities, and elected officials were making the rhetorical case for the necessity of state and local solutions, Kobach designed legislation for localities, using his background in constitutional law to ensure a colorable legal basis for his proposals.¹⁹² On July 13, 2006, Hazleton, Pennsylvania enacted a Kobach-authored law, in a well-publicized, real-life instantiation of this theory of state and local control.¹⁹³ A scant four days later, on July 17, 2006, the city

189. Rumbaut et al., *supra* note 66.

190. Ruy Teixeira, *Public Opinion Watch*, CENTER FOR AMERICAN PROGRESS (Apr. 5, 2006), <http://www.americanprogress.org/issues/2006/04/b1531059.html>.

For example, in the most recent *Time* poll, 68 percent said illegal immigration was a very or extremely serious problem and, in a just-released Pew poll on immigration (PDF), 74 percent termed immigration at very big or moderately big problem, up from 69 percent in 2002. In the same Pew poll, 52 percent now say that "immigrants today are a burden on our country because they take our jobs, housing and health care" (up from 38 percent in 2000), compared to 41 percent who say "immigrants today strengthen our country because of their hard work and talents" (down from 50 percent in 2000).

Id.

191. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast Oct. 5, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0610/05/ldt.01.html>).

192. Leah Nelson et al., *When Mr. Kobach Comes to Town: Nativist Laws and the Communities They Damage*, S. POVERTY LAW CTR. (Jan. 2011), available at <http://www.splcenter.org/get-informed/publications/when-mr-kobach-comes-to-town>.

193. Hazleton, Pa., Ordinance 2006-10 (July 13, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0003.pdf>; see also Nelson et al., *supra* note 192.

of Valley Park, Missouri enacted a similar ordinance, also authored by Kobach, targeting landlords and local employers.¹⁹⁴ From that point, with significant media coverage focused on those and similar enactments, subnational immigration lawmaking gained significant momentum.¹⁹⁵ In our analysis of data from the National Council of State Legislatures, the most significant spike in restrictive state legislation also occurred during this time, more than tripling from 2005 to 2006 (from fifteen to forty-nine), and then doubling in 2007 (to ninety-eight laws enacted). Again, it is worth recalling that this surge occurred during a national economic boom, with low unemployment.

Obama First Term (2009 to 2012): During the Bush Presidency, issue entrepreneurs built their organizations and began organizing their multilevel strategy. In the early part of the decade, they took advantage of a post-9/11 context, which allowed them to conflate terrorism and immigration concerns and increase party polarization, which allowed them to solidify a restrictionist stance as a lame-duck President's influence within his party waned.¹⁹⁶ By the time Obama began his Presidency, issue entrepreneurs were riding the strong momentum of their victory in derailing 2007 bipartisan federal reform and the enactment of several high-profile subfederal laws, like the Legal Arizona Workers Act of 2008 and Hazleton-type laws in places as far flung as Farmers Branch, Texas and Riverside, New Jersey.¹⁹⁷ During the past four years, issue entrepreneurs have grown prominent and entrenched, and their work has become systematized and evident.

While party polarization has generally stalled many initiatives at the federal level, Obama was successful in mobilizing federal legislative majorities to end "Don't Ask, Don't Tell" and to pass a federal health care overhaul. Despite being able to herd enough votes to pass health care legislation—an area of traditional state dominance with strong libertarian

194. Valley Park, Mo., Ordinance 1708 (July 17, 2006), *available at* http://www.aclu.org/files/pdfs/immigrants/valleypark_ordinance.pdf; *see also* Nelson et al., *supra* note 192.

195. Aaron Couch, *State Illegal Immigration Laws: What Have They Accomplished?*, CHRISTIAN SCI. MONITOR, Mar. 23, 2011, <http://www.csmonitor.com/USA/Politics/2011/0323/State-illegal-immigration-laws-What-have-they-accomplished>.

196. Joe Klein, *Bush's Last Days: The Lamest Duck*, TIME MAG. (Nov. 26, 2008), <http://www.time.com/time/magazine/article/0,9171,1862464,00.html>.

197. ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2008); Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007), *available at* <https://www.farmersbranch.info/sites/default/files/Ordinance%20No%202903.pdf>, *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008); Riverside, N.J., Ordinance 2006-16 (July 26, 2006), *available at* http://www.aclu.org/files/pdfs/immigrants/riverside_firstordinance.pdf.

valences—the Obama administration has been unable to make any progress on immigration, an area traditionally relegated to federal control.¹⁹⁸ Indeed, in late 2010, Congress was unable to pass the DREAM Act, one of the most popular individual pieces of the 2007 comprehensive reform package (and even now a measure with broad public support).¹⁹⁹ In a coordinated effort, FAIR and NumbersUSA, along with the Center for Immigration Studies, ensured that the DREAM Act proposal would not survive a Senate filibuster. Completing the project begun in 2001, issue entrepreneurs' exacerbation of party polarization on immigration meant that by the 2010 DREAM Act vote, no moderate Republicans remained to help break the filibuster and effectuate national majoritarian preferences.²⁰⁰

While that federal legislative effort stalled, border security and enhanced enforcement by the Department of Homeland Security continue. In efforts to bring enough Republicans (sufficient to break the filibuster) to the negotiating table on the DREAM Act or other immigration reforms, the President used his executive power to make enforcement concessions that angered his own party's base but that were also seemingly designed to bring polarized restrictionists to the negotiating table and begin bipartisan reform.

198. *E.g.*, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”); *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (“That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, . . . has . . . been given continuous recognition by this Court.”).

199. *Public Support for the Dream Act*, FIRST FOCUS (June 2010), http://www.firstfocus.net/sites/default/files/dreampollbreakdown_0.pdf.

200. Professor Roderick Hills, analyzing the role of policy advocates in mobilizing federal action, compared such advocates to surfers, who “wait for the right wave of problems and politics before [they] can move.” Hills, *supra* note 56, at 20. While it remains true, as Hills notes, that these entrepreneurs rely on the “right opportunities and incentives”—that is, in our framework, the right partisan conditions—we introduce a slight twist on his conception. *Id.* We envision an active and deliberative role for the restrictionist issue entrepreneur, in creating opportunities and incentives. In our conception, congressional inaction does not cause the immigration entrepreneur to spring into action; rather, the entrepreneur presses for a national legislative stalemate when proposed federal policy is unlikely to yield all the outcomes desired by restrictionists. This may be especially true at this moment in jurisprudential history, given the Court's recent turn against campaign finance regulation. At least one scholar predicts that *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), is a boon to issue entrepreneurs, easing the funding of their campaigns. See Orbach et. al., *supra* note 45, at 1167. Thus, we might predict that entrepreneurs will now exponentially enhance their power and funding with each minor success. Kuran & Sunstein, *supra* note 42, at 714 (noting that the phenomenon of an availability cascade feeds on itself, and that once successful, availability entrepreneurs will command greater resources); Orbach et al., *supra* note 45, at 1169 (arguing that private lawmakers' power and funding increase with each city that clones or enacts a suggested law).

For example, President Obama used his executive power to order National Guard troops to the border, and his administration has been deporting immigrants at record rates.²⁰¹ These executive concessions, however, have not succeeded in breaking the hold of issue entrepreneurs over the number of lawmakers necessary to overcome a filibuster and enact immigration reform or popular parts of such reform.

Stepped up national enforcement, moreover, has not mollified restrictionist critics, either at organizations such as NumbersUSA or among conservative media personalities. With the departure of Dobbs from CNN in 2009, groups such as FAIR now rely more heavily on conservative talk radio hosts and special events such as the annual “Hold their Feet to the Fire” conference in Washington, D.C., where the organization brings together dozens of conservative radio hosts to focus on illegal immigration and immigration enforcement, combined with rallies, visits to wavering legislators, and guest appearances by sympathetic members of Congress.²⁰² As the New York Times noted, such events allow FAIR to maintain its own race-neutrality while its associates are free to invoke ethnic nationalist frames: “This year’s event mixed discussion of job losses among minorities with calls to use Tomahawk missiles on Tijuana drug lords, while a doubter of President Obama’s birth certificate referred to ‘the undocumented worker’ in the White House.”²⁰³ And concerns about national security and sovereignty continue to remain salient, as prominent radio personalities such as Roger Hedgecock continue to press the notion that Mexican drug cartels control vast portions of the Southwest.²⁰⁴

Meanwhile, subnational legislative activity continues unabated, most notably at the state level. Even as the Department of Justice sues to enjoin one enactment, issue entrepreneurs create others, each one subject to federal challenge, and each consuming federal prosecutorial and judicial resources. Moreover, each subsequent enactment appears to expand the boundaries of

201. Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, WASH. POST, July 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html?sid=ST2010082704452>.

202. Pamela Constable & N.C. Aizenman, *Rally Against Illegal Immigration Scheduled*, WASH. POST, April 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/21/AR2007042101213.html>.

203. Jason DeParle, *The Anti-Immigration Crusader*, N.Y. TIMES, Apr. 17, 2011, at A1, available at http://www.nytimes.com/2011/04/17/us/17immig.html?pagewanted=all&_r=0.

204. Roger Hedgecock, *Mexican Drug Cartels Control Parts of Arizona*, HUMAN EVENTS (June 18, 2010, 3:01 AM), <http://www.humanevents.com/2010/06/18/mexican-drug-cartels-control-parts-of-arizona/> (“Think about it. A part of America is off limits to U.S. citizens because it is now controlled by an army of foreigners.”).

state and local enforcement activities, adding increasingly punitive policies with each step. Discussing a provision of the Alabama law he authored, Kobach noted a new provision that made the state “the first . . . to invalidate all contracts entered into with illegal immigrants. A strict reading of the law could mean that any contract, including mortgages, apartment leases and basic work agreements, can be ruled null and void.”²⁰⁵ Importantly, Kobach has also pushed back against national efforts to enshrine restrictive measures such as E-Verify in 2012, arguing that such bills would “establish a fairly toothless E-Verify requirement while defanging the only government bodies that are serious about enforcing immigration law — the states.”²⁰⁶

While expanding the scope of subnational laws with each enactment, entrepreneurial strategy has also matured and systematized with regard to venue selection. Prospectively, the Polarized Change model utilizes the mechanics of the decentralized and federated party system to unlock the predictive power of party polarization. While party polarization helps issue entrepreneurs advance their policy positions and keep immigration restriction high on the party agenda, it concurrently allows observers to predict where the entrepreneurs are likely to strike next. As our data showcases, rather than look to areas of significant demographic or economic change, issue entrepreneurs are more likely to look to areas of Republican party domination with enterprising candidates and officials, regardless of the underlying demographic factors.²⁰⁷ Thus, for instance, the November 2011 switch of the Mississippi House of Representatives from Democrat to Republican for the first time since Reconstruction has meant that the House will no longer be able to bottle up legislation in committees controlled by Democrats.²⁰⁸ Notably, Mississippi ranks as the third-lowest

205. Alan Gomez, *States Make Daily Life Harder for Illegal Immigrants*, USA TODAY, Dec. 20, 2011, <http://usatoday30.usatoday.com/news/nation/story/2011-12-20/illegal-immigrants-contracts-void/52132602/1> (Kobach continued by noting that the provision could have “much greater effect than some people might expect at first glance”).

206. Kris W. Kobach, *Another Amnesty? New Bill Hobbles Border States*, N.Y. POST, June 15, 2011, http://www.nypost.com/p/news/opinion/opedcolumnists/another_amnesty_LauPhaZnaURz3fUcpXAphK.

207. See *North Carolina Could be Next to Pass Statewide Immigration Law*, NUMBERSUSA (Dec. 9, 2011, 01:22 PM), <http://www.numbersusa.com/content/news/december-9-2011/north-carolina-could-be-next-pass-state-wide-immigration-law.html>.

208. Jeff Amy, *GOP Takes Miss. House for 1st Time in Years*, BOSTON GLOBE, Nov. 14, 2011, http://www.boston.com/news/nation/washington/articles/2011/11/14/gop_takes_miss_hou se_for_1st_time_in_years/. In February 2012, the Mississippi Immigrant Rights Alliance noted that “with the Republicans in charge now for the first time . . . [w]e expect many anti-immigrant bills to come from that chamber . . .” Mississippi Immigrant Rights Alliance,

state in terms of immigrant share of the resident population (two percent of the total population in 2010), and this grew from about 1.5 percent of the population in 2000.²⁰⁹ Finally, even in states with more sizable new immigrant populations, such as North Carolina, partisan dynamics seem to be of paramount importance. As NumbersUSA reported on the conditions in North Carolina for its State and Local alert: “with Republicans now in control of the state legislature in North Carolina, efforts have begun to pass similar, statewide legislation to crack down on illegal immigration.”²¹⁰

Meanwhile, the major judicial development of the last four years was the Supreme Court’s ruling in *Arizona v. United States*,²¹¹ in which the Obama Justice Department sued to enjoin the state’s immigration enforcement scheme.²¹² The Court struck down three of the four provisions at issue, but preserved, for the time being, the provision directing local police to check the immigration status of suspected individuals.²¹³ Both majority and dissenting opinions in *Arizona* are notable for their adoption of the narrative of issue entrepreneurs—of state and local pressure in the wake of federal impotence. Justice Kennedy’s majority opinion sympathized with the state’s purported immigration woes, stating “[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration.”²¹⁴ Justice Scalia’s dissent made specific factual claims, with no evidentiary citation:

Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.²¹⁵

Mississippi Republicans Up to No Good, IMMIGRATION PROF. BLOG (Feb. 1, 2012), <http://lawprofessors.typepad.com/immigration/2012/02/mississippi-republicans-up-to-no-good.html>.

209. See *Mississippi QuickFacts from the U.S. Census Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28000.html> (last updated Sept. 18, 2012); *Source: Mississippi Fact Sheet*, MIGRATION POL’Y INST., <http://www.migrationinformation.org/datahub/state.cfm?ID=ms> (last visited Sept. 14, 2012).

210. NUMBERSUSA, *supra* note 207.

211. 132 S. Ct. 2492 (2012).

212. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

213. *Id.* at 2510.

214. *Id.* at 2500.

215. *Id.* at 2522 (Scalia, J., dissenting); see also Richard A. Posner, *Justice Scalia is Upset about Illegal Immigration, But Where is His Evidence?*, SLATE MAG. (June 27, 2012),

Thus, the true measure of entrepreneurial success in Arizona may not be the salvaging of one of its enforcement provisions but rather the Supreme Court accepting the narrative that state and local immigration laws are necessary to “fix” federal failures.

The Court’s preservation of the so-called “show me your papers” provision emboldened Arizona officials, as well as those in other states who have either passed or are considering state immigration enforcement bills.²¹⁶ They appear to have read *Arizona* as a victory for state and local immigration regulation, rejuvenating their restrictionist stances, as Alabama’s attorney general remarked, “[t]oday the Supreme Court acknowledged that state law enforcement can play an important role in assisting the federal government in fulfilling its responsibility to enforce [federal immigration law].”²¹⁷

While it remains to be seen whether these types of statements are mere rhetoric in the face of a disappointing result for restrictionists, states and localities are still left with significant room to maneuver after *Arizona*. First, among SB 1070’s provisions that were not presented for Court review—and are therefore good law in the state—are the law’s purpose statement and its statewide preemption of local sanctuary ordinances.²¹⁸ Importantly, SB 1070’s statement of purpose announces “attrition through enforcement” as the state’s explicit goal, and its survival is at least symbolically significant for subfederal immigration involvement. Second, *Arizona*’s injunction of

http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html (“But the suggestion that illegal immigrants in Arizona are invading Americans’ property, straining their social services, and even placing their lives in jeopardy is sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.”).

216. Yvonne Wingett Sanchez, *Arizona Immigration Law: Gov. Jan Brewer Claims Victory*, ARIZ. REPUBLIC, June 25, 2012, <http://www.azcentral.com/news/politics/articles/2012/06/25/20120625arizona-immigration-law-gov-jan-brewer-claims-victory.html> (quoting Gov. Brewer’s declaration that the Supreme Court upheld the “heart of the law”); Valerie Richardson, *Arizona’s AG: Court’s Ruling is ‘a 70% win’*, WASH. TIMES, June 25, 2012, <http://www.washingtontimes.com/news/2012/jun/25/arizonas-ag-courts-ruling-is-a-70-win/?page=all>.

217. Jorge Rivas, *Ala. Attorney General Luther Strange Reacts to SCOTUS SB 1070 Ruling*, COLORLINES (June 25, 2012), http://colorlines.com/archives/2012/06/ala_attorney_general_luther_strange_responds_to_scotus_sb_1070_ruling.html.

218. S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf> (“[T]he intent of this act is to make attrition through enforcement the public policy of . . . Arizona.”); *id.* at § 2A (“No official or agency of this state or a county, city, town . . . may . . . [limit or restrict] the enforcement of federal immigration laws to less than the full extent permitted by federal law.”).

three of SB 1070's provisions does not resolve the constitutionality of the other types of state enforcement provisions at issue in other state and local enactments. For example, it remains unclear whether localities can enact rental ordinances²¹⁹ or whether Alabama's provision invalidating contracts entered into by unauthorized immigrants or its law collecting immigration status information at public schools are constitutional.²²⁰ It would take at least another Supreme Court case to address, let alone resolve, those outstanding attempts at state and local immigration regulation.

Finally, Justice Scalia's dissenting opinion in *Arizona* not only relied on empirically unsound claims, it was also conspicuously political.²²¹ In a few paragraphs, Scalia criticized President Obama's decision to defer prosecution of certain young, law-abiding undocumented students as an "unwise" use of federal funds.²²² Judge Posner of the Seventh Circuit described Scalia's critique as "fighting words" and "inflammatory," noting that the Administration's program was announced after *Arizona* was argued and appears nowhere in the record of the case.²²³ The exchange suggests that the politicized nature of immigration policy proliferation may be extending even further than Congress and state and local legislative bodies to the U.S. Supreme Court itself.

To summarize, during the Obama Presidency, we witnessed the fruition of the entrepreneurial vision: engendered gridlock at the national level at key moments of potential bipartisan compromise, providing the rhetorical hook and policy vacuum necessary to proliferate state and local legislation. This legislative landscape has become so normalized that Presidential hopeful Mitt Romney promised that his putative administration would "support states like South Carolina and Arizona that are stepping forward to address this problem [of illegal immigration]."²²⁴ Far from the 2000–2001

219. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *judgment vacated on other grounds sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011). The U.S. Supreme Court forestalled a final decision on the case by remanding it to the federal appeals court for consideration in light of the Court's recent decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

220. H.B. 56, 2011 Leg., Reg. Sess. §§ 8, 27, 28 (Ala. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011rs/bills/hb56.htm>.

221. *See* Posner, *supra* note 215 (Judge Posner criticizing Justice Scalia's opinion: "It wouldn't surprise me if Justice Scalia's opinion were quoted in campaign ads. The program that appalls Justice Scalia was announced almost two months after the oral argument in the *Arizona* case. It seems rather a belated development to figure in an opinion in the case.").

222. *Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting).

223. Posner, *supra* note 215.

224. Press Release, Mitt Romney, Mitt Romney Announces Support of Kansas Secretary of State Kris Kobach (Jan. 11, 2012), <http://www.presidency.ucsb.edu/ws/index.php?pid=99028>.

Bush platform of bipartisan federal reform, focused on meeting labor needs and increasing legal immigration, this new vision imagines states and localities as the primary bulwarks against a flood of unauthorized immigration to the United States.

III. A PRELIMINARY CONCLUSION: THE IMPLICATIONS OF POLARIZED CHANGE

Our purpose in this paper has been to foreground the politicized nature of immigration policy and to provide a thick description of the mechanism fomenting both state and local policy proliferation, and federal policy stagnation. This description, based on extensive quantitative and qualitative investigation, lays the groundwork for a fundamental rethinking of the current judicial and scholarly appraisals of this recent spate of state and local immigration regulation. We leave that task for a future project,²²⁵ but we briefly note some of those implications.

Because restrictionist issue entrepreneurs appear to be engaging a strategy of judicial, rather than congressional, engagement, the Polarized Change model challenges some of the basic tenets of federalism analysis. When state and local policy proliferation is motivated by political, rather than regional demographic challenges, the purported values of decentralized decisionmaking are highly compromised. In short, states and localities cease to be idealized “laboratories” of policy experimentation and fail to produce instructive responses to demographic problems.²²⁶ Rather, by highlighting the salience of ethnic nationalism, the polarized change model suggests that courts should consider equality-based, as opposed to structural power, frameworks to evaluate the constitutionality of state and local immigration laws.

More globally, both courts and commentators must abandon functionalist explanations of state and local immigration regulation. While scholars have carved out important normative space for state and local immigrant efforts to integrate immigrants, they have done so by adopting the unsupported demographic assumptions popularized by issue entrepreneurs. Moreover, Polarized Change challenges “steam-valve” theories of immigration federalism which maintain that isolated subfederal enactments are desirable because they dissipate restrictionist or anti-immigrant sentiment at the local

225. Gulasekaram and Ramakrishnan, *The New Immigration Federalism* (awaiting submission) (forthcoming 2013)

226. See Cunningham-Parmeter, *supra* note 187, at 1673.

level, thereby relieving the pressure to enact those laws at the federal level. Polarized Change, however, suggests that proliferating policies in politically receptive subfederal jurisdictions builds, rather than dissipates, pressure for restrictive action at the federal level and, more generally, enshrines a more restrictionist status quo. These critical developments require extensive and detailed analysis, which we pursue elsewhere.

For the better part of the last decade, states and localities have markedly increased their immigration-related lawmaking. Our prior statistical analysis has shown that these laws are rarely driven by pressing demographic problems and that local political contexts are better predictors of restrictive action. Further, we have argued that the federal gridlock purportedly compelling these state and local laws is not merely a “given.” Instead, it is purposefully engineered by restrictive issue entrepreneurs who seek to proliferate restrictionist legislation at the subfederal level. Thus, our new theory of immigration regulation elegantly accounts for both federal legislative stagnation and state and local policy proliferation.

This theory of Polarized Change, however, is only possible when we search beyond purely legal and functional accounts of the rise of subfederal immigration law. Importantly, we must understand the fundamental ways in which the politics of immigration influence policy expression, subtly shifting constitutional norms, and influencing judicial actors and scholarly commentary. We believe this paper provides a necessary corrective to this trend of apoliticized, demography-based evaluations of this rising phenomenon. More significantly, by showing how these extra-constitutional factors inherently affect legal appraisal of these phenomena, we hope that courts, commentators, elected officials, media actors, and the general public will modulate their responses based on this more accurate understanding.

APPENDICES

Appendix A. Description of our City and State Data Sets

We start with a baseline of cities (defined as “places” in most states, but also including “county subdivisions” in others). Next, we obtained lists of cities that have proposed restrictive ordinances and regulations from various sources, including the American Civil Liberties Union, the Puerto Rican Legal Defense and Education Fund, the Fair Immigration Reform Movement, the National Immigration Law Center, and the Migration Policy Institute. We then validated these lists by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances. The data on city ordinances become far less reliable after 2007, with a sharp decline in newspaper reports of new municipal ordinances and no further tracking of municipal legislation by national advocacy groups.

We merged information on the proposal and passage of ordinances with census data on various demographic factors. The census data are primarily from 2000.

Finally, we came up with a measure of state-level legislative activity on immigrant integration based on reports from the National Conference of State Legislatures from 2005, 2006, and 2007, and we included any measures that bear a significant relationship to illegal immigration. Two graduate research assistants were instructed to code the bills an ordinal scale of 1: “low impact” and 2: “high impact” on immigrant rights and/or access to benefits, based on the provision’s likely effects on immigrant life chances and the number of immigrants likely to be effected. Since these two categories offered a stark distinction, inter-coder reliability was ninety-four percent. In the cases where two codes conflicted, the principal investigator (Ramakrishnan) provided the tie-breaking vote. Finally, when we use state-level activity as a contextual variable in our municipal dataset, we use a net total measure of such activity, given multiple laws passed in various states, including a mix of permissive and restrictive ones.

Appendix B. Multivariate Regression Analyses**Table B.1.** Logit Regression Estimations of Municipal Ordinances

	Proposal		Passage	
	Restrictive	Pro	Restrictive	Pro
Republican majority in county	0.967***	-1.406***	1.454***	-1.430***
	[5.222]	[-8.675]	[9.942]	[-8.970]
Percent naturalized in population	-0.027	-0.037	0.01	-0.042
	[-1.243]	[-1.968]	[0.612]	[-2.268]
Growth in immigrant population, 2000-2007	0	-0.013***	0	-0.012***
	[-0.481]	[-48.159]	[-0.885]	[-47.768]
Agriculture jobs (share)	-0.046	0.001	-0.183*	-0.001
	[-2.896]	[0.086]	[-14.463]	[-0.039]
Percent of immigrants who are recent arrivals	0.004	0.027***	0.01	0.027***
	[1.356]	[9.385]	[3.955]	[9.578]
Overcrowded households (% of total)	0.024	0.061*	0.037	0.068**
	[0.810]	[2.409]	[1.606]	[2.717]
White poverty rate	-0.009	0.038**	-0.02	0.036**
	[-0.779]	[3.794]	[-2.191]	[3.652]
Black poverty rate	0.006	0.003	-0.003	0.003
	[1.537]	[0.842]	[-1.214]	[1.011]
Population (ln)	0.672***	1.426***	0.712***	1.412***

	[12.147]	[29.456]	[16.298]	[29.648]
State policy climate	0.025	0.001	0.032	-0.002
	[0.980]	[0.061]	[1.630]	[-0.080]
<i>Constant</i>	-11.631***	-19.717***	-12.893***	-19.579***
<i>Observations</i>	16,384	16,384	16,384	16,384
<i>Pseudo-R2</i>	0.12	0.48	0.16	0.48

* significant at 10%; ** significant at 5%; *** significant at 1%, based on two-sided tests. Significance (p) values in brackets

Note: Number of observations reduced because of missing data on nativity in cities below 6,000 residents. Poverty rates from 2000 census because of missing data on black poverty rates in an additional 7,176 cities.

Table B.2. Regression Estimations of Restrictive State Laws Enacted, 2005-2010

Republican share of voters	0.156**
	[0.441]
Percent of immigrants who are recent arrivals	-0.0536
	[-0.116]
Growth of Latino population	0.0521
	[0.219]
White poverty	0.139
	[0.113]
Black poverty	-0.0285
	[-0.0605]

Agriculture jobs (share of total)	-0.504*
	[-0.391]
<i>Constant</i>	-4.28
	[0.000760]
<i>Observations</i>	50
<i>R-square</i>	0.22

* significant at 10%; ** significant at 5%; *** significant at 1%, based on two-sided tests. Significance (p) values in brackets.

Note: The dependent variable is no major laws, one major law, two or more major laws.